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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-361

In re Applications of

CARROLL, CARROLL & ROWLAND — File No. BPH-870430NK

GLORY FM LIMITED PARTNERSHIP — File No. BPH-870430NL

For a Construction Permit for a New FM Station on Channel 281A in Calhoun, Tennessee

ORDER

Adopted: March 23, 1990; Released: April 9, 1990

By the Commission:

1. Before the Commission for consideration are a Decision, *Carroll, Carroll and Rowland*, 4 FCC RCD 7149 (Rev. Bd. 1989); an Application for Review filed October 23, 1989 by Glory FM Limited Partnership; and an Opposition filed November 7, 1989 by Carroll, Carroll and Rowland. We agree with the Board's resolution of this case and we therefore adopt its decision.

2. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed October 23, 1989 by Glory FM Limited Partnership, is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286

In the Matter of

Amendment of Part 67 (new Part 36)
of the Commission's Rules and
Establishment of a Federal-State
Joint Board

ORDER

Adopted: March 29, 1990; Released: April 9, 1990

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), we hereby appoint The Honorable William E. Long, Chairman of the Michigan Public Service Commission (Michigan PSC), to the Federal-State Joint Board in CC Docket No. 80-286. Chairman Long was nominated February 21, 1990, by the National Association of Regulatory Utility Commissioners to fill a vacancy on the Joint Board. This vacancy was created by the January 1, 1990, resignation of James M. Fischer from the chairmanship of the Missouri PSC. Henceforth a copy of all filings in these proceedings shall be served on Chairman Long at the following address:

The Honorable William E. Long, Chairman
Michigan Public Service Commission
Mercantile Building
6545 Mercantile Way
Post Office Box 30221
Lansing, Michigan 48909

2. Accordingly, IT IS ORDERED, pursuant to Section 410(c) of the Communications Act of 1934, 47 U.S.C. §410(c), that William E. Long will serve as a member of the Federal-State Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-504

In re Applications of

ANCHOR BROADCASTING LIMITED PARTNERSHIP	File No. BPH-860917MD
SELBYVILLE BROADCASTING CO., INC.	File No. BPH-860918MB
GALAXY COMMUNICATIONS, INC.	File No. BPH-860918NY
SUSAN M. BECHTEL	File No. BPH-860918OV

For a Construction Permit for
a new FM Station on Channel 250A
(97.9 MHz) in Selbyville, Delaware

Appearances

Lewis I. Cohen and *Roy W. Boyce*, on behalf of Anchor Broadcasting Limited Partnership; *Dennis J. Kelly*, on behalf of Selbyville Broadcasting Co., Inc.; *Barry D. Wood* and *Ronald D. Maines*, on behalf of Galaxy Communications, Inc.; and *Gene A. Bechtel*, on behalf of Susan M. Bechtel.

DECISION

Adopted: March 16, 1990; Released: April 10, 1990

By the Review Board: BLUMENTHAL and ESBENSEN; Board Chairman MARINO dissenting; Board Member ESBENSEN issuing separate statement.

Board Member BLUMENTHAL:

1. This proceeding involves the applications of Anchor Broadcasting Limited Partnership (Anchor), Selbyville Broadcasting Co., Inc. (SBC), Galaxy Communications, Inc. (Galaxy), and Susan M. Bechtel for authority to construct a new FM station in Selbyville, Delaware.[1] The case was heard on a standard comparative issue, after which Administrative Law Judge Joseph Chachkin (ALJ) ruled that Anchor was the comparatively superior applicant. *Initial Decision* (*I.D.*), 4 FCC Rcd 5687 (1989). The proceeding is now before the Review Board on exceptions. We have reviewed the *I.D.* in light of the pleadings, the record below, and the oral argument held on January 5, 1990.[2] While we largely adopt the ALJ's findings of fact, we reverse his ultimate conclusion and award the construction permit to Galaxy.

2. The *I.D.* selected Anchor as the superior comparative applicant. In so doing, the ALJ had determined that only Anchor and Galaxy, neither with any attributable mass media interests, were also entitled to 100% credit for proposing full-time integration of ownership with management control, another pivotal criterion under our *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (*Policy Statement*). As between those two frontrunners, the ALJ ultimately concluded that:

> Anchor and Galaxy have established their entitlement to 100% integration credit. Also, Anchor and Galaxy suffer no diversification demerit. However, Anchor prevails on qualitative enhancement. Anchor's substantial credit for 100% minority involvement, future local residence, and auxiliary power credit outweighs Galaxy's very slight credit for recent local residence, recent and *de minimis* civic activity, auxiliary power credit, and very slight comparative coverage advantage.

I.D. at para. 47 (footnote omitted).

3. SBC, whose own ownership "integration" proposal was rejected by the ALJ, *see id.*, paras. 43-44, here seeks: (1) rehabilitation of its rejected "integration" proposal; (2) rejection of Anchor's "integration" proposal (as well as financial and misrepresentation issues against Anchor); and (3) rejection of the "integration" credit awarded to Galaxy. Somewhat similarly, Galaxy also seeks rejection of Anchor's "integration" proposal (as well as financial and false certification issues against Anchor). And, finally, while broadly challenging the efficacy of the "integration" proposals of all of its three competitors, Bechtel confines its formal exceptions to a frontal challenge to the *Policy Statement's* basic "integration" criterion, and it claims that its own proposal (which candidly seeks no ownership "integration credit) will better serve the public interest nonetheless.[3]

4. After reviewing the *I.D.*, the underlying record, and the pleadings before us, we hereinbelow grant, in part, the exceptions of SBC and Galaxy as to Anchor, deny *in toto* the exceptions of Bechtel, deny the exceptions of SBC as to its own application, and find that Galaxy should prevail under the standard comparative tenets of the *Policy Statement*. Our reasons now follow.

EXCEPTIONS

I. ANCHOR

5. Whereas the *I.D.* awarded Anchor a 100% quantitative full-time "integration" credit for the management proposal of one of Anchor's four 25% equity principals, and its sole "general" partner, Dr. Herman Stamps,[4] SBC and Galaxy urge that the evidence does not support Anchor's claim that its "general" partner will remain wholly insulated from its "limited" partners in the management of the company. Both exceptors point to circumstantial and testimonial evidence for the proposition that, although Anchor's limited partnership agreement may contain the boilerplate insulation provisions mandated by the

Commission's *Ownership Attribution* policies, *see supra* note 4, it is exceedingly unlikely that Stamps, a retired dentist and Howard University Dental School faculty member, will relocate to Selbyville (population 1250) and unitarily manage the proposed Anchor station. In support of their contentions, the exceptors advert to the past relationships between Stamps and his three "limited" partners, to Stamps' hearing testimony as to the likely nature of their future relationships, and to Stamps' predicted domicile.

6. In background, both the *I.D.* (para. 6) and the exceptions reflect that Stamps and Anchor's three other 25% equity principals, Ridgley C. Bennett, R. Kenneth Mundy, and Francis L. Smith, were formerly constituted as a corporation d/b/a District Broadcasting Inc., which entity in 1978 filed a competing application for the frequency occupied by WOOK(FM), Washington, D.C. The Review Board affirmed the Initial Decision of a Commission ALJ awarding that contested frequency to District Broadcasting[5]; however, District Broadcasting later settled that proceeding with the incumbent licensee, and it withdrew its competing application in consideration of $1,275,000. Some four months later, these same four District Broadcasting principals filed their instant application for Selbyville, this time d/b/a Anchor.

7. The exceptors observe, and the record here confirms, that while prosecuting their Washington, D.C. application (as District Broadcasting) from 1978 to 1986, these same four Anchor principals likewise each held equity interests of 25%, but none proposed management passivity as either a "limited partner or a non-voting shareholder: all were equal, active, and voting shareholders. In fact, when questioned at this hearing as to whether all four principals participated actively in the business affairs of District Broadcasting, Stamps testified in the affirmative, and he went on to explain that all four Anchor principals met frequently to discuss such matters as the ascertainment of community needs, program format, advertising demographics, the hearing exhibits submitted to the FCC by District, and all "met extensively with radio people, broadcast people to develop an attitude about what the station would be." Tr. 53. As to their roles in District, Stamps here responded (Tr. 54):

> JUDGE CHACHKIN: In other words, you acted as equals, all four of you.
>
> THE WITNESS: Oh, yes.
>
> JUDGE CHACHKIN: You all equally participated and all equally made decisions.
>
> THE WITNESS: Yes.

8. Not only did all four principals take an active role in District while prosecuting that FM radio application, all four would have overseen the general policy and the program format ("the general things that an owner would do") at the Washington, D.C. radio station, Tr. 52,[6] and all four would have been active members of that station's "Policy and Program Board" had they acquired that FM radio license. When asked whether Mundy, Bennett, and Smith would have been actively involved with "the programming effort" of that station, Stamps replied: "Naturally, we were equal stockholders." *Id.* Although the four Anchor principals settled out of that case, the experience of being involved with broadcasting merely piqued their appetite for the challenges of broadcasting, so they filed quickly for Selbyville. Or, as Stamps expressed it (Tr. 55-56; emphasis added): "We were *into* broadcast . . . the broadcast thing. We *still* had the taste in our mouth.

9. With that "taste" still fresh, the four District Broadcasting principals almost immediately filed their instant application d/b/a Anchor. Paradoxically though, claim the exceptors, not only was the Anchor application not structured to emplace three of the same four excited principals "into broadcasting, its limited partnership structure, by law, would virtually prohibit three of those same principals (Mundy, Bennett, Smith) from *any* active role in broadcasting (save a possible return on investment), since passive investors are barred absolutely under *Ownership Attribution* from so much as "communicating with the licensee or the general partner on matters pertaining to the day-to-day operations of its business." 58 RR 2d at 619.

10. Above and beyond the active policy role played, and slated to be played, by all of Anchor's principals at their proposed Washington, D.C. radio station, the exceptors also focused upon the extremely close business and social relationships that yet fuse the four Anchor principals. For in addition to the District Broadcasting and Anchor ventures, Kenneth Mundy testified that he, Stamps, Bennett and Smith are joined in other investments together, Tr. 272-276, and that (Tr. 258):

> All four of us are what you would call the very best of social friends. Our wives are probably playing bridge right now.

And, as Mundy explained, these relationships (of several decades duration) transcend the merely social (Tr. 260):

> Yes, socially, but you see, I have to add, I've been Dr. Stamps' lawyer too. When you said business, that's why I -- he's my wife's, he's our family's, he was our family's dentist, and I was his lawyer, so we've talked about things that would come under the panoply of that. Oh, I've talked to him about his job at Howard. So, Mr. Woods, I've been the lawyer for all three of them at one time or -- of my partners, at one time or another.

See also Tr. 261-262.

11. Because Stamps here testified that all four Anchor principals had "naturally" intended to be relatively active in the Washington, D.C. station affairs, since they were all (as here) "equal" owners, and in light of the exceedingly close social and business relationships still maintained amongst the four principals, Stamps was quite "naturally" questioned about the proposed passivity of three of the four Anchor principals, whose taste for broadcast involvement had only been intensified by their immediately prior experience. Thus, Galaxy counsel propounded to Stamps as follows (Tr. 151; emphases added):

> Q. Well, what is your expectation about how the actual relationship among the partners is going to work?
>
> A. *Well, I am afraid to answer that question because I know what is expected of me by law.* Now, when you say talk about, well, you know, like somebody

might yell down the street something and that might constitute talking about it. So I don't know how to answer that question according to the law.

I mean there's a real world, and then there's this.

Right here I am going by this.

Q. But in the real world you expect that you probably will have --

A. *I would not admit that any darn way.*

Q. Excuse me?

A. *I would never answer you on that one, sir.*

MR. WOOD: I direct the witness to answer, your Honor?

12. Anchor's counsel briskly intervened at that point, and after brief colloquy the examination of Stamps continued (Tr. 153; emphasis added):

Q. But realistically, given the relationship among the four of you, don't you expect there are going to be some conversations about the station if you are having problems with a particular employee, or you wanted to change the format or anything like that, that you are going to end up talking to these partners about those things, if you happen to meet them in a social --

A. *I don't know which amendment there is about possible self-incrimination, but I certainly wouldn' t answer "yes." I would stick to what this says.* I always have control of the second side of communication.

13. The exceptors cite not only to Stamps' stated reluctance to answer, under oath, questions concerning the likely working relationship amongst Anchor's principals, and his purposeful distinction between its paper agreement and the "real world," they note as well that Mundy (an attorney) testified that he was unaware of any Anchor contract clause that specifically precluded him from discussing ordinary station business with Stamps. The questioning of Mundy went as follows (Tr. 264):

Q. Are you aware of any prohibition on your discussing the business of the station with Dr. Stamps?

A. I'm aware of the fact that Dr. Stamps, as general partner, is the person who will run and be the sole authority for running the station. Uh, and I would accept it at that.

Q. But you're not aware of any explicit provision that says you can't talk to him about the business of the station?

Before Mundy could answer, Anchor counsel again objected (Tr. 265); and after that objection was overruled, Mundy stated (Tr. 266):

THE WITNESS: I'm not aware of anything in writing that says I can't talk to him about it.

After further consultation between the ALJ and counsel, Mundy was provided with a copy of the Anchor partnership agreement, shown the specific clause requiring his total insulation from day-to-day station affairs, and the questioning of Mundy resumed (Tr. 269):

Q. So, is today the first time that you were really aware of the precise prohibition that's set forth in subparagraph B as to your communicating with the general partner about the day-to-day operations?

A. Yes, sir. In that language, yes sir.

Q. All right. So, I take it it wasn't specifically discussed at any of the organizational meetings that took place relating to the formation of Anchor?

A. It may have been and my memory is just lax. It may very well have been.

Q. But you don't remember any such discussions focusing on this provision?

A. I -- I can't highlight it in my mind now a particular discussion on that.

Although all of the Anchor principals elsewhere indicated an awareness of the agreement's insulation element, and pledged generally to abide by the written agreement, the exceptors assert that the testimony of Stamps and Mundy evince very little intent or expectation to hew strictly to the technical terms of the Anchor agreement, at least in the "real world.

14. The exceptors next challenge directly Dr. Stamps' pledge to relocate to Selbyville, so as to manage Anchor's proposed station on a full- time basis. In support of this challenge, they observe that Stamps currently maintains his home in Washington, D.C., where Stamps testified that his "business interest is still centered." Tr. 73. However, Stamps has been "gradually" transferring his affairs to his other home in Ladysmith, Virginia, a town approximately 60 miles south of Washington, D.C., which Stamps describes as "[m|y principal residence for tax purposes." Tr. 72. To avail himself of Virginia's 5.75% marginal tax rate on personal income (State of Virginia Tax Rate Schedule (official notice taken)), "in contrast to substantially higher rates in Maryland and the District of Columbia,"[7] Stamps testified that he must be in residence there for at least six months-and-a-day each year. Tr. 74. Although, at hearing, Stamps testified that he could not allocate the time he presently spends in Ladysmith, "I guess at some time I *will have to start* making a diary on it." Tr. 72-73 (emphasis added). In addition to his homes in Ladysmith and Washington, D.C., Stamps has a home in Cape Cod, Massachusetts and a yacht anchored in Baltimore, Maryland, on which vessel he also occasionally resides.

15. Stamps indicated no plans to sell (or rent) his Ladysmith "domicile," his Cape Cod home, or his Washington, D.C. residence. In an attempt to set the record straight as to Stamps' proposed future residence, the ALJ himself interjected (Tr. 71-72; emphases added):

JUDGE CHACHKIN: Well, let's put it more bluntly. Will you maintain a residence somewhere else besides the Selbyville area?

> THE WITNESS: I don't know. I have several residences now, and what -- and whether I would confine my living -- *I don't see commuting, going up and down the road every weekend*, so that I have a place in Virginia, a place in D.C. I have a place in Maryland, and I have a place in Delaware. I *think that I would probably be pretty much in the capital area. I think other areas would be visitations. That cannot be predicted.*

Inasmuch as Stamps evinced utterly no intention to forsake his Virginia "tax domicile," and in view of his testimony that he plans to locate "pretty much in [the] capital area," but not "commuting . . . up and down the road every weekend," the exceptors contend that Stamps' pledge to relocate his residence to Selbyville cannot be credited, by dint of his own conflicting and/or equivocal testimony.

16. Galaxy, and to a lesser extent SBC, contend that Anchor's intent to abide by the strict terms of its limited partnership contract is further belied by a "side agreement" to provide construction and operational financing for the proposed station, an agreement they contend is in flat conflict with the Anchor partnership contract itself. In this, they point to Paragraph 7(c) of the Anchor contract, which provides: "In no event shall the Limited Partners be obligated to contribute more than $21,250 each as capital contributions." Further, Paragraph 13(a)(iv) of the Anchor contract provides: "No Limited Partner shall be liable for the debts of the Partnership in excess of his contributions to the capital of the Partnership." And, finally, Paragraph 23(b) thereof provides: "This Agreement represents the *entire* understanding between the parties and cannot be amended except in writing . . . ." (Emphasis added.)

17. Anchor's principals conceded at deposition that the $85 thousand ($21,250 x 4) called for by their limited partnership contract would not cover all of their requisite expenses; rather, the principals later claimed at hearing that the $85 thousand was intended to cover only the expenses of prosecuting the Anchor application, and that all four had a mutual oral agreement to each contribute another 25% of all costs for constructing the station and for operating the facility for the first three months (without resort to advertising revenues).[8] Although Anchor principal Bennett initially denied any extant obligation on the part of each partner to contribute in excess of $21,250,[9] Anchor eventually supplied the declarations of all four principals attesting that, prior to Anchor's financial certification, each had orally agreed to contribute equally toward construction and operating costs as well.[10] The exceptors charge that the alleged oral "side agreement" is not only patently inconsistent with Anchor's written partnership contract, and therefore a legal nullity, they also charge that the ALJ committed reversible error in refusing to add financial and misrepresentation issues against Anchor, asserting that the existence of a "side agreement" in such evident conflict with its own contemporaneous writing is plainly incredible.

18. Initially, we do not believe that the ALJ erred in failing to add a financial (and a misrepresentation) issue against Anchor. What we believe is that the exceptors have overdrawn the same set of facts regarding the "side agreement" for Anchor's financing, and attempted to impale one peg into two quite disparate holes, *viz.*, basic financial qualifications, for one, and integration of equity ownership with day-to-day management, for another. As to the first, Anchor filed at a time when all that was necessary was the applicant's self-certification that it genuinely possessed "reasonable assurance" of the resources necessary to meet the Commission's minimum financial standard. *See Revision of Form 301*, 50 RR 2d 381, 382 (1981); *see also Priscilla L. Schwier*, 4 FCC Rcd 2659 (1989), *aff'd per judgment sub nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1256 (D.C. Cir. filed February 7, 1990).[11] Anchor has submitted the sworn declaration of each of its principals that he has always been fully committed to construction and operation costs, over and above the $21,250 "prosecution" expenses specified in their limited partnership contract. Our exceptors can merely speculate that these declarations are untrue in the face of the partnership contract's very precise limitation on equity contributions. But all four Anchor principals stoutly avow otherwise, and nothing in the FCC application form (or elsewhere) required that a financial certification be supported by a written contract, particularly where the principals are self-financing as are Anchor's.[12] The exceptors have not shown that the Anchor principals are not committed financially (as per their declarations); and they have by factual allegation raised no palpable doubts whatever that any of the principals cannot meet his respective financial obligations to cover all costs, especially in the wake of their joint $1,275,000 windfall in the WOOK-FM proceeding just prior to their certification. Where a direct challenge to a financial certification is based on not much more than speculation, no hearing issue will be added. *Priscilla L. Schwier*. Whatever the strict language of Anchor's limited partnership contract (or its tangential implications), and in the absence of any factual information rebutting the apparently timely promises of Anchor's principals to supply the necessary funding, or raising questions as to their ability to satisfy those mutual pledges, we find no substantial and material questions ripe for litigation on the facts. *Compare, e.g., Opal Chadwell*, 4 FCC 2d 1215 (1989) (proceeding remanded on substantial question over applicant's personal assets).

19. As to the second aspect of the exceptors claims arising out of the strict financial contribution/liability language of the Anchor partnership contract, we do not find that any variance between that language and its principals' "side agreement" to furnish funding is nearly sufficient, by itself, to conclude that Anchor has demonstrated that it intends not to be otherwise bound by the unrelated terms of its written contract, so much so that Anchor's basic "integration" proposal must be rejected. Though we acknowledge the apparent variance, we believe it is entitled to only slight evidentiary weight as regards Anchor's "integration" proposal, for as discussed immediately below we conclude that additional, more persuasive evidence of record requires us not to award that pivotal credit.

20. The case law is long and unwavering that every applicant has the burden of proof under the *standard comparative* issue, and must convincingly support each component element thereof. In carrying that burden, though, the Commission will generally accept the simple pledges or promises of an applicant, and these pledges will not be discounted unless countervailing evidence raises sufficient doubt that we cannot say the applicant has met its ultimate burden. Almost routinely, however, we do find that a particular applicant has *not* overcome

direct or circumstantial evidence at unlikely odds with a mere self-serving pledge as to some facet of its comparative case, including "integration." *See, e.g., Joseph Bahr*, 92 FCC 2d 114, 121 (Rev. Bd. 1982) (integration credit refused where written organizing agreement not substantially respected), *aff'd sub nom. Global Broadcasting Group, Inc.*, 54 RR 2d 404 (1983), *aff'd*, 763 F.2d 450 (D.C. Cir. 1985); *Blancett Broadcasting Co.*, 17 FCC 2d 227, 229 (Rev. Bd. 1969) (integration credit refused where conflicting business interests not overcome); *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-986 (Rev. Bd. 1986) (same), *review denied*, 2 FCC Rcd 1780 (1987), *aff'd per judgment*, 841 F.2d 428 (D.C. Cir. 1988); *Lenninger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987) (same), *review denied*, 3 FCC Rcd 1811 (1988); *Doylan Forney*, 3 FCC Rcd 6330, 6334-6335 (Rev. Bd. 1988) (integraton credit denied where no true management function demonstrated); *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 493-494 (Rev. Bd. 1984) (same). Another applicant in *Doylan Forney* was denied "integration" credit where the pledge of personal full-time management was too impermanent. 3 FCC Rcd at 6334; *see also Signal Ministries, Inc.*, 104 FCC 2d 1481, 1497-1498 n. 16 (Rev. Bd. 1986)(same), *review denied*, 2 FCC Rcd 1259 (1987), *aff'd per judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988).[13]

21. More recently, and in the wake of a deluge of applicants proposing a two-tiered ("active"/"passive") ownership structure, the Commission and the Board have rejected a host of extrapolated "integration" requests, where probative evidence strongly suggested that certain equity principals would not remain wholly passive, even in the face of written contracts and the stated pledges of the principals. *See, e.g., Metroplex Communications, supra* note 4, 4 FCC Rcd at 8159 (and cases cited therein). Or, as the Commission stated in *Coast TV*, 4 FCC Rcd 1786, 1787 (1989):

> [S]ometimes an applicant may present a favorable formal structure on paper in order to gain a quantitative integration preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision-making process. In those instances, the Commission disregards the applicant's formal ownership structure and treats the nominally passive owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant -- and thus relevant to the Commission's integration analysis. *See, e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-97 ¶¶ 15-16 (Rev. Bd. 1986), *review denied* 2 FCC Rcd 1259, 1259 ¶ 2 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988); *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 9 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co.*, 63 FCC 2d 419, 424-26 ¶¶ 10-13 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non-voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be discredited. *Victory Media*, 3 FCC Rcd 2073, 2074 ¶ 18 (1988).

22. And "integration" credit has likewise been withheld where direct or salient circumstantial evidence leaves serious questions as to whether a particular equity principal, pledging to relocate to another community so as to personally manage the station on a full-time basis, will earnestly forsake a current residence. Again, while the Commission will conventionally accept a simple pledge to relocate, any evidence to the contrary will be weighed simultaneously, and we will not always accept the bare pledge. *See, e.g., Knoxville Broadcasting Corp.*, 103 FCC 2d 670, 686-689 (Rev. Bd. 1986) (integration credit denied despite pledge to relocate); *Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-13 (Rev. Bd. 1978) (integration credit denied, in part, because of dubious pledge to relocate). Not only with respect to pledges to relocate a permanent residence, but with respect to all facets of an "integration" proposal, the *Knoxville* Board reflected:

> In practice, it lies with the applicant advancing an "integration" proposal to allay any serious questions which may bear upon likely effectuation of that proposal, despite strong circumstantial evidence raising inevasible doubts. Sometimes an applicant is successful in dispelling the serious doubts that have arisen. *See, e.g., Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 586-589 (Rev. Bd. 1982)(restoring integration credit rejected by ALJ) (majority opinion), *recon. denied*, FCC 82R-77, released December 22, 1982, *aff'd* , FCC 83-415, released September 21, 1983 (Comm'n), *aff'd mem. sub nom. Blake-Potash Corp. v. FCC*, No. 83-2112 (D.C. Cir. filed April 26, 1985). Sometimes an applicant is, on the slant of the record, unpersuasive. *See, e.g., KIST Corp.*, 99 FCC 2d 173, 183 n. 22 (Rev. Bd. 1984), *modified on other grounds*, FCC 85-512, released September 24, 1985 (Comm'n), *appeal pending sub nom. United American Telecasters, Inc., v. FCC*, Nos. 85-1663, et al. (D.C. Cir. filed October 15, 1985). And, as suggested by the court's accompanying memorandum in *Blake - Potash, supra*, "substantial evidence" on the question of the likelihood of the effectuation of a particular applicant's "integration" proposal may support, legally, either predictive judgment.

103 FCC 2d at 687-688 (footnote omitted). Based on the entirety of the record in the case at bar, we must agree with the exceptors that the evidence taken as a whole "rais[es] inevasible doubts" as to two of Anchor's pledges, and that it has not met its burden of "dispelling the serious doubts that have arisen" through the record evidence.

23. Thus, notwithstanding the strict terms of Anchor's limited partnership contract (which at least on financial obligations were not taken by Anchor at face value), the record here is decidedly unpersuasive that Anchor's limited partners intended to be barred absolutely from substantive communications about station management, or are likely to remain wholly insulated in practice. First, Anchor has not explained cogently why its principals were keenly active with respect to their just previously applied-

for FM facility, were left with an unsatisfied "taste" for more, but here switched lightly to absolute passivity on such vital matters as community needs and programming.[14] Second, while (as in their prior application) Stamps is slated to be General Manager, and all three other principals would have deferred to him there, Anchor principal Mundy was unaware that its limited partnership contract contained strict language *prohibiting* any discussions as to station management, which hardly evinces a conscious *intent* to be barred from such communications. More likely it seems the intent of the attorneys drafting the contract, so as to maximize Anchor's "integration request by mechanical extrapolation. Third, in view of the deep and long-standing relationships amongst the principals, we thoroughly understand Stamps' repeated reluctance, under oath, to testify as to how their association would actually work in the "real world," as well as his sundry and pointed caveats that he "would stick" to the strict insulation onus "[r]ight here" at hearing. We have previously regarded as evasive and rather telling the testimony of a witness who suggested that his responses were for hearing purposes. *See Mid-Ohio Communications, Inc.*, 104 FCC 2d 572, 596-597 (Rev. Bd. 1986). Stamps' stated reluctance, and his purposive qualification of his testimony, is scarcely reassuring. To say the least, the totality of the record evidence on this point does not support the liklehood of a wall of silence between Anchor's 75% equity owners and Stamps as to station policy and affairs. When Stamps was questioned as to whether his fellows were, and would have been, active at their proposed Washington, D.C. radio station, we recall his reply: "*Naturally*," they were all equal owners; only they *here* seek 100% (extrapolated) "integration" credit, as compared to the 25% sought in their Washington, D.C. application. Anchor has not carried its burden of rebutting the "inevasible doubts" that they will operate at arms-length; it has conversely compounded them.

24. Even were we to accept *arguendo* Anchor's claims of prospective limited partner passivity, we could not on this record credit Stamps' bare pledge to relocate his residence to Selbyville, so as to personally manage day-to-day activities at the proposed station. Too much testimonial (and circumstantial) evidence runs against that *ipse dixit*. In *Berryville Broadcasting*, for example, a pledge to relocate a personal residence was held not proven, even where that principal had already purchased a mobile home in the proposed community of license. In view of the fact that the *Berryville* principal did not commit to relinquishing his other homes, and could not describe what he meant by his "primary residence," the Board found the relocation pledge "to be so vague that it cannot be credited." 70 FCC 2d at 12.

25. Here, Stamps has several current homes, has indicated no intent to relinquish any of them, and has selected none in Selbyville. Moreover, his testimony stated, albeit cryptically, that he thought he would locate "pretty much in the capital area," and that he did not see "commuting . . . every weekend." Further, he would not even *predict* where his residences would be. Tr. 71-72. Finally, not only did Stamps disclaim to intimate that he would relinquish his "tax domicile" in Ladysmith, Virginia (where he must reside 6 months a year for residence benefits), he went so far as to state that he "will have to *start* making a diary" on his time spent in Ladysmith, Tr. 72-73, so as to document his legitimate entitlement to a Virginia residency. This seems flatly inconsistent with his pledge to relocate his prime residence to Selbyville.

26. In *Knoxville Broadcasting*, and without finding that a residency relocation pledge was intentionally disingenuous, we also denied "integration credit where an applicant's principal did not, by substantial evidence, overcome ambient facts that spawned natural doubts as to the sufficiency of a bare relocation pledge. *See* 103 FCC 2d at 687-689.[15] The record here runs much more strongly against Anchor than did the evidence against the subject relocation pledges in *Berryville* and *Knoxville*. Stamps has not only failed to allay the doubts created by the circumstantial evidence, his own testimony (at best) only heightens those doubts, and in our view undercuts his bare pledge so deeply that Anchor cannot be said to have met its evidentiary burden on Stamps' request for full-time personal "integration" credit at Selbyville.

27. We must here stress that, in agreeing with the exceptors that Anchor did not meet its burden on the personal "integration" credit it seeks, we are not directly challenging the witness credibility findings of the ALJ. Rather, by giving due weight to *all* of the testimony of Anchor's principals (conjoined with the other evidence), we simply cannot find the substantial evidence to support the comparative credit awarded by the ALJ. And the law holds that where an ALJ and a reviewing authority merely balance the same evidence, but come to opposite results on an ultimate question, no legal violence is done to an ALJ's contrary findings. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951); *see also Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 853 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971).[16] We do not affirm the "integration" credit awarded by the ALJ.

II. SELBYVILLE BROADCASTING

28. For reasons similar to those just discussed with respect to Anchor's quest for personal management "integration" credit, the ALJ denied credit to SBC, despite the pledge of its (purported) sole proprietor, Rita Capobianchi.[17] SBC excepts to the ALJ's refusal to honor Capobianchi's pledge, not based on the ALJ's factual findings (which SBC does not seriously dispute), but on its legal argument that nothing in the case contradicts Capobianchi's pledge.[18]

29. We will not reiterate all of the facts, set out in the *I.D.* at paras. 17-28, against which the ALJ contrasted Capobianchi's simple pledge to personally "integrate" full-time at Selbyville, but incorporate by reference those findings herein. Suffice it, then, to iterate some of the more salient facts: Capobianici holds 33% of the outstanding stock of DB Communications, Inc., a Bethesda, Maryland consulting radio engineering firm, the controlling balance of which is held by her husband, Darrell Bauguess, a radio engineer. She is currently Secretary/Treasurer of DB (as well as one of its two Directors), and is its Director of Operations where she oversees "the operations of the office, entailing recruiting engineers, interviewing them, hiring, doing the financial quarterly reports for the company, sending the statements out, posting them, and overseeing, in general, the entire running of the offices." *Id.*, at para. 19 (quoting Tr. 325). Though she has said she will give up these workaday duties, leave her husband's firm, and move to Selbyville, she has not

indicated that she will divest her DB stock or her officer/directorship, nor has she given any consideration to training a replacement for her at DB. *Id.*, para. 20.

30. Furthermore, although Capobianchi maintains her own personal bank account, most of SBC's application expenses have been paid by DB Communications. At her deposition, she declared that she intended DB to continue to pay SBC's expenses; at hearing she denied having said so. *Id.*, para. 23. While there is no loan agreement between DB and SBC (or Capobianchi), she considered the DB checks to have been in the nature of an "officer advance," but denies telling her husband about these substantial advances. She also denied that her husband later suggested not using DB funds for Selbyville, but her husband testified that he "directed" her not to do so after the date of his deposition. Sometime during the hearing, she stopped using DB funds, but could not explain why. *See id.*, paras. 24-25. DB prepared SBC's engineering exhibit, and her husband accompanied her to the bank to discuss the SBC loan. *Id.*, para. 22. Despite all of this, neither DB nor her husband are claimed to have any equity interest in SBC.

31. Moreover (*id.*, at para. 28)[19]:

> Bauguess and Ms. Capobianchi have three children, ages, 7, 11 and 15. She has never had more than casual discussion with her husband as to who would care for them if she moves to Selbyville (Tr. 352-353). They will not accompany her to Selbyville and she plans to rely upon her husband (who is employed fulltime at DBC) and her mother. She has not, however, discussed her plans with her mother (Tr. 371-372). She does not believe her mother (who does not reside with the family) will do more than she does now, which is to prepare dinner. She views her eldest two children as being self-sufficient (Tr. 504-505). The DBC offices are located in close proximity to the Bauguess residence and the children's schools (Tr. 522-523).

32. Finally, while Capobianchi was here pledging to personally relocate to Selbyville to full-time manage that proposed station, she simultaneously had on file with the Commission two other FM broadcast applications, one in Murells Inlet, South Carolina, and another in Charlottesville, Virginia. *Id.*, para. 27. Through the time had not come for filing formal "integration proposals" in those two proceedings, Capobianchi was asked whether she planned to personally manage either of those two stations, if either of those Construction Permits were awarded to her during the pendency of this Selbyville proceeding. After indicating in the affirmative, she explained (Tr. 356):

> Q. When did you decide that you were going to be integrated in Charlottesville and in, uh, Murrells Inlet?
>
> A. I hadn't really -- when I decided?
>
> Q. Yes?
>
> A. I think it's all pending what happens with the outcome of this.
>
> Q. Yeah, well, when did you make that decision. that you would be integrated subject to the outcome of this proceeding?
>
> A. When I -- when I filed the application, I thought about it then.

The ALJ sought to clarify her response (Tr. 358):

> JUDGE CHACHKIN: This application may go on for two or three years. The question is what are you going to do with Charlottesville in the meanwhile?
>
> THE WITNESS: Well, if Charlottesville comes up for hearing, uh, and I'm still in this proceeding, then I will dismiss it.
>
> MR. COHEN: When did you come to that conclusion that you just expressed to the Judge?
>
> THE WITNESS: Right now; I'm in a hearing.

After being shown her deposition in which she had indicated an intent to pursue her Charlottesville proposal, the ALJ pressed the witness further (Tr. 370-371; emphases added):

> JUDGE CHACHKIN: Well, let's turn it around, supposing the Charlottesville application is granted before the Selbyville, Delaware, application, then what would you do?
>
> THE WITNESS: Is granted?
>
> BY JUDGE CHACHKIN:
>
> Q. Yes?
>
> A. You're talking about the construction permit?
>
> Q. Yes?
>
> A. Before Selbyville, well --
>
> Q. Yes?
>
> A. *Then I'd probably have to go with Charlottesville.*
>
> Q. *And is that also true about Murrells Inlet, if that application is granted before Selbyville, you would go with that one, before Charlottesville and, uh --*
>
> A. *Yes.*
>
> Q. All right.

33. We will squarely affirm the ALJ's refusal to grant personal "integration" credit to SBC, based upon Capobianchi's bare (and conditional) pledge. Not only has Capobianchi failed to demonstrate how she will extricate herself from her deep involvement in the affairs of DB Communications, *see Blancett Broadcasting, supra*; *Ft. Collins Telecasters, supra*,[20] or persuasively supported her claim to move to Selbyville, *see Knoxville Broadcasting, supra*; *Berryville Broadcasting, supra*, the financial and operational relationships between Capobianchi, DB, and its principal owner, Darrell Bauguess (her husband), in connection with this application are so intertwined that, at a minimum, we could not proceed further with its application prior to further hearing on a real-party-in-interest issue against SBC. *See Richard P. Bott II*, 4 FCC Rcd 4924, 4928-4930 (Rev. Bd. 1989); *see also N. E. O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986) (wife claims sole ownership so as to extract 100% "integration" credit, plus full gender enhancement). In fact, the entire scenario sketched loosely by Capobianchi and Bauguess is so "illogical and highly suspicious," *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985), that we

would also add a lack of candor issue at that further hearing. From her allegedly "covert" use of DB Communications' funds, to her airily contemplated suggestion of leaving her critical management duties at DB, to her claim that she will also leave her home and three tender children in the care of her husband (also, then, saddled unitarily with the operation of DB Communications) and her mother (with whom she has not discussed the matter) to move to Selbyville (or South Carolina or Virginia, whichever first), this blithe "integration" proposal "is at best highly implausible and at worst utterly ridiculous." *Id.*[21]

34. And even if we overlooked all of the foregoing, her pledge here to move to Selbyville appears clearly to have been contingent on any prior success with her concurrent Murrells Inlet and/or Charlottesville applications, but we do not accept conditional "integration" pledges where the occurrence of the operative condition cannot be foretold at the time the pledge is made. For this reason alone (as if more were needed), we find Capobianchi's bald offer to move to Selbyville "too 'conditional and uncertain' an undertaking to be credited." *Utah Television Associates, Ltd.*, 102 FCC 2d 1470, 1480 (Rev. Bd. 1985); *cf. Metro Broadcasting, Inc.*, 99 FCC 2d 688, 706 (Rev. Bd. 1984) (separate statement)(subsequent history omitted).[22] The *I.D.* is ratified as to SBC.

III. GALAXY

35. Galaxy is a Delaware corporation, all of the stock of which is owned by Alexander Soroka (President/Board Chairman). On October 9, 1987, Soroka purchased a home in Selbyville, where he now spends 80% of his time. His only local civic activity is the Lion's Club, which he joined in early 1988. Nobody challenges his Selbyville residence or his 40(+) hour per week commitment to the station. However, his relatively recent move to Selbyville and his scant civic activities are entitled to only very slight weight under "past local residence." *See Bradley Hand and Triplett*, 89 FCC 2d 657, 663 (Rev. Bd. 1982).

36. Although Soroka has proposed to be the General Manager of his station, and has no recorded conflicts, SBC challenges Galaxy's full-time integration credit on the theory that his anticipated duties are insufficiently specific to be regarded as "managerial." Thus, Soroka indicated that he will supervise his sales and programming employees; but, asserts SBC, he will not personally sell commercial air time, be an announcer, news director or reporter, serve as bookkeeper, or do any engineering. Nor will he choose the music personally.

37. The 1965 *Policy Statement* expressly recognizes the role of General Manager, 1 FCC 2d at 395, and the case law does not require that managerial owners perform employee-type functions to receive "integration" credit. Indeed, employee-type functions are given no credit whatsoever. *Id*; *Doylan Forney*, *supra*, 3 FCC Rcd at 6335. SBC does not directly challenge Soroka's pledge to live in Selbyville, devote full-time to his wholly-owned station, to oversee his few employees, or to set vital station policies. Hence, the cases cited in its exceptions are plainly inapposite.[23] Even accepting at industrial strength the facts set out in SBC's exceptions, a demurrer would not be insufficient to reject its own nebulous objections, as did the ALJ (*see also* Tr. 549-550). We will affirm the 100% full-time integration credit awarded to Galaxy.

IV. CONCLUSION

38. With Galaxy the only applicant receiving 100% full-time ownership/management integration credit, it must prevail because a clear quantitative "integration" advantage cannot be overcome by various qualitative attributes. *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 605 & n.7 (D.C. Cir. 1984); *accord*, *Jerome Thomas Lamprecht*, 3 FCC Rcd 2527 (1988); *cf. Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 (1987) (subsequent history omitted). With no media diversification priorities appearing here, Galaxy's clear "integration" preference is dispositive.

39. ACCORDINGLY, IT IS ORDERED, That the motion to strike filed September 25, 1989 by Anchor Broadcasting Limited Partnership IS DENIED; and

40. IT IS FURTHER ORDERED, That the application of Galaxy Communications, Inc. (File No. BPH-860918NY) IS GRANTED, and the applications of Anchor Broadcasting Limited Partnership (File No. BPH-860917MD), Selbyville Broadcasting Co., Inc. (File No. BPH-860918MB), and Susan M. Bechtel (File No. BPH-860918OV) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] It appears that eleven (11) applicants were originally designated for consolidated comparative hearing, *Hearing Designation Order*, 2 FCC Rcd 7051 (1987), but only the four (4) captioned applicants remain.

[2] After hearing oral argument, the Board urged the parties to continue their discussions toward an amicable settlement, and to report back any progress. We were later advised by counsel that no settlement could be reached.

[3] In support of its unorthodox exceptions, Bechtel, on November 15, 1989, filed a lengthy supplement to its exceptions purporting to demonstrate that the Commission's ownership "integration" criterion, as more recently applied, has been inadequate to promote long-range ownership on the part of Construction Permit recipients. We will strike this unauthorized pleading, which is not permitted under Commission rule, *see* 47 CFR § 1.277, and its attendant motion for leave. Not only is Bechtel's pleading unauthorized, insofar it merely augments Bechtel's exception theory that the Commission's "integration" policy is "bankrupt," and should be ignored (at least in this case), it must be deemed irrelevant here, since the Board has no authority to the afford the relief it seeks.

[4] By operation of the Commission's *Ownership Attribution* policies, 97 FCC 2d 997 (1984), *on reconsideration*, 58 RR 2d 604 (1985), *clarified*, 1 FCC Rcd 802 (1986), as extended to ownership "integration" calculations in comparative licensing proceedings, the "passive" ownership interests of *bona fide* "limited" partners are not factored at all into the "integration" analysis. Or, put another way, the equity interests of only the "active" principals (*e.g.*, "general" partners) are extrapolated to the applicant as a whole, *as if* these "active" principals were the

exclusive equity owners. For a more elaborate discussion of these dynamics, *see Metroplex Communications, Inc.*, 4 FCC Rcd 8149, 8150 (Rev. Bd. 1989).

[5] *United Broadcasting Company, Inc.*, 94 FCC 2d 938 (Rev. Bd. 1983), *modified*, 57 RR 2d 885 (1985) (incumbent granted renewal).

[6] However, in their District Broadcasting application, all four Anchor principals did not propose to "integrate" full-time into station management. There, as here, only Dr. Stamps pledged to devote full-time to station management. But they there sought only 25% "integration" credit, whereas they here seek 100% for Stamps' solo "integration" proposal, based upon Anchor's limited partnership structure rather than District's corporate form.

[7] Galaxy Exceptions at 14. The comparable rate for Delaware is 7.7% on incomes above $40 thousand (official notice taken), a 25% differential.

[8] The ability to prosecute, construct and operate for 3 months is the current FCC financial standard. *See Financial Qualifications*, 69 FCC 2d 407 (1978).

[9] Galaxy Exceptions at 33 (citing Bennett Deposition at 18).

[10] *See id.*, at 34-35 (quoting Declarations). The Anchor principals also claim to have exchanged personal financial statements prior to their financial certification to the FCC, to ensure that each was adequately endowed to meet both his oral and written commitments to Anchor.

[11] The Commission has recently abandoned its financial certification process in favor of its prior regime calling for advance documentation, *Revision of Application for Construction Permit*, 4 FCC Rcd 3853 (1989), but all applicants here filed under the 1981 regime calling only for self-certification of economic resources sufficient to meet our minimum financial standard.

[12] In fact, the Commission has also recently held that the applicants filing under the 1981 certification regime need not have prepared contemporaneous documentation, but may document their finances at a later date if called upon to do so. *Northampton Media Associates*, 4 FCC Rcd 5517 (1989). In providing "reasonable assurance" of financing, "an oral contract to lend money would suffice," *id.*, at 5519, assuming that the lender's own ability is not suspect.

[13] Because we find that Anchor has not persuasively supported its "integration" proposal for other more obvious reasons, we do not base our adverse determination on the exceptors' claims that Stamps' personal management commitment is impermanent, within the purport of *Doylan Forney* or *Signal Ministries*. Like much of Stamps' testimony, his passing comment (at Tr. 133) that the "foreseeable future" represents only 2 or 3 years is too ambiguous to decipher.

[14] At one point in the testimony, Anchor principal Mundy suggested that a ceiling on liability was part of the basis for choosing a limited partnership form for Anchor, in contrast to the corporate form the principals had utilized as District Broadcasting. After testifying that the limited partnership format was utilized on advice of communications counsel, Tr. 270, Mundy suggested that limitations on financial liability might have played a part, Tr. 273, but he acknowledged that, as a mere corporate shareholder in District Broadcasting, his liability would have been rather similarly limited. Tr. 273-274. And we note that all Anchor principals were *voting* shareholders in District; none was non-voting so as to signal passivity. *See Evening Star, Broadcasting Co.*, 68 FCC 2d 129, 133-136, *recon. denied*, 68 FCC 2d 158 (1978).

[15] It is true that in *Knoxville Broadcasting* the Board was affirming an ALJ's determination not to honor a residence relocation pledge, whereas we are here responding to exceptions to the honoring of such a pledge. Nonetheless, the standard enunciated in *Knoxville* (103 FCC 2d at 688), as applied neutrally here, compels the same ultimate result, to wit:

> [T]he eventual question we must ponder is whether, by "substantial evidence" on this record, Mrs. Walker has shown herself as likely to effectuate - in full - her ambitious "integration" proposal in a manner that clearly warrants the important comparative credit that comes with personal management involvement. We regret to say that the surrounding facts and circumstances here give us insufficient confidence in the probability of the unqualified effectuation of Mrs. Walker's "integration" bid.

[16] Somewhat on this same general point of law, the majority in *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977), viewed inferences derived from witness observation by an ALJ as "testimonial inferences," and inferences drawn from the record as a whole as "derivative inferences". Assuming that dichotomy, our determination on Anchor's "integration" credit proceeds from the latter genre of inference, and not necessarily the former.

[17] Actually, SBC is depicted as a Maryland corporation with one class of voting stock, all owned by Ms. Capobianchi. *I.D.*, para. 17.

[18] *See* SBC Exceptions at 5-14.

[19] The questioning of Capobianchi on this aspect of her relocation pledge went as follows (Tr. 371-372).

> Q. Now, you stated that you had three children, and I want to ask you in the event that your children are ill and you are in Selbyville, uh, carrying out your duties as general manager, uh, your testimony is, strike that, let me -- let me back up.
>
> Am I correct that you do not intend to, uh, to bring your children with you to Selbyville?
>
> A. That's correct.
>
> Q. Your children will remain in Bethesda?
>
> A. That's correct.
>
> Q. Now, in the event that your children are ill, and you're in Selbyville, have you and your husband talked about how they will be provided for or taken care of?
>
> A. No.
>
> Q. And it's true, isn't it, that your Mother takes care of them now when they are sick?
>
> A. That's correct.
>
> Q. And does your Mother -- would your Mother be the one who would take care of them if they were ill and you were in Selbyville?
>
> A. She or Darrel.
>
> Q. And Darrel is your husband?
>
> A. Yes.
>
> Q. And he works full time, I take it, in carrying out his responsibilities in DB Communications. Is that correct?
>
> A. Yes.
>
> Q. Okay, does your Mother know you propose to be integrated full time in Selbyville?
>
> A. No.

Q. Does she know you're planning to move to Selbyville?

A. No.

Q. Does she know that you're planning to leave your children at home in Bethesda and a move off to Selbyville?

A. No.

[20] In both *Blancett and Fort Collins*, the Board held that applicants with significant business conflicts at the time of a personal "integration proposal must show a *specific* plan for eliminating that conflict. Here, Capobianchi has demonstrated nothing palpable with respect to her DB ownership or her present duties, *I.D.*, para. 21, and has not therefore met the test for ignoring her current business interests. *See also Washington's Christian Television Outreach*, 99 FCC 2d 395, 416-419 (Rev. Bd. 1984) (integration pledges not honored; professional conflicts not overcome), *modified on other grounds*, 59 RR 2d 785 (1985), *recon. denied*, 59 RR 2d 1679 (1986), *aff'd per judgment*, No. 85-1649 (D.C. Cir. December 17, 1987).

[21] Lest it be thought that our skepticism over Capobianchi's pledge to leave her family for entire work weeks is based on her gender, we observe that the same skepticism is evidenced under remarkedly similar circumstances in *Berryville* with respect to a husband's proposal. *See* 70 FCC 2d at 9-12.

[22] It is true that no formal "integration" pledges had been made in Murrells Inlet or Charlottesville at the time Capobianchi testified in ths hearing. However, her testimony makes clear that she intended to "integrate" into whichever station came first, and the ALJ was correct (Tr. 358) that neither we nor Capobianchi could predict which (if any) of her three FM applications might be granted sooner. We will not speculate. (Nor does it matter that she has since dismissed her two non-Selbyville applications. This *post-hoc* fortuity cannot be used to bootstrap or upgrade her status obtaining during this Selbyville hearing).

[22] SBC Exceptions at 21.

[23] *See id.* at 22-23.

DISSENTING STATEMENT OF BOARD CHAIRMAN MARINO

The record reveals that the experienced Administrative Law Judge in this case maintained a firm but fair control of the hearing, and then correctly concluded that the preponderance of substantial evidence establishes the *bona fides* of Anchor's application. The snippets of record, cited by opposing counsel, and relied on by the majority to discredit Anchor's application, fail to reflect the thrust of the testimony, its overall context, and omit considerable evidence that fully supports the ALJ's judgment. In past cases, the Board has declined "to follow the lead of skillful advocates for the competitors" and "assume that witnesses are lying in their written exhibits and oral testimony absent stronger proof than has been marshalled by the competitors in this case." *Central Texas Broadcasting Co.*, 90 FCC 2d 583, 596 (Rev. Bd. 1982), subsequent history omitted. */ "Absent extrinsic evidence to the contrary", the Commission has reminded us that an ALJ's judgment about specific testimony "is entitled to great weight." *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986).

Here, extrinsic evidence does not undermine the ALJ's findings; on the contrary, the totality of the record supports the Initial Decision. To begin, with regard to Dr. Stamps' so-called "real world" testimony, cited at Decision, paras. 11-12, it must be noted, first, that immediately prior to giving that testimony, Dr. Stamps unequivocally explained his understanding of the partnership agreement as follows (Tr. 150-151):

Q. And you would still expect to be able to talk with them [the other partners] about the business of the station?

A. In the language of the agreement, I understand I am not supposed to accept their consultation or seek it, or anything else that concern day to day matters of the station. I can only answer in the context of that I have sworn to.

Then, after the "real world" comment was elicited, the ALJ interjected and expressly admonished counsel to avoid the kind of general questions that had led to the comment and to ask Dr. Stamps specific questions as to his understanding of the partnership restrictions (Tr. 151-152). Thereupon, the following exchange ensued (Tr. 152-153):

Q. If you were to meet with Dr. Smith for instance in a party in his home I believe Portal Road, and there were other individuals that are present who wanted to know about the station in Selbyville, would this provision bar Dr. Smith from talking to these other people in your presence about what was going on with the station in Selbyville?

A. This provision does not bar Dr. Smith from talking to anybody else.

Q. Well, what about when you are present?

A. In my presence? I can't stop him from talking to somebody else. I don't read that in here.

Q. Well, you can't stop him from talking to you either about the station affairs, right?

A. That's true. Stop. But "communicate" would imply an exchange.

Q. But you do intend to talk to him about the business of the station, don't you?

A. Not according to this, no. This says nor shall any communication between the general partner or the partnership on matters of day to day operations.

Now, you can talk about the outside of the business but not the day to day operations of this or any other media enterprise. I think I understand the restrictions.

When asked how "realistic" the partnership restrictions were, Dr. Stamps explained (Tr. 154-155):

Q. Do you view this restriction set forth here as to the ability of the limited partners to communicate with you on matter pertaining to the day to day operation as an unrealistic constraint that's been imposed upon the partnership by FCC regulations?

> A. Well, when I signed the bottom of this document I signed myself to live under this provision. I don't see a restriction here as awkward as it may apparently be any different from SEC's regulations dealing with inside trading or anything else. A lot of these things must be controlled by laws I have to subscribe to. This is what I want. I can live with them.

Plainly, the thrust of Dr. Stamps' above-quoted testimony is that he intends to observe the partnership agreement, even in "real world" situations.

Similarly, as to Mr. Mundy's understanding of the partnership restrictions, the majority opinion does not reflect that immediately after his response quoted from Tr. 266 at Decision, para. 13, the ALJ once again found it necessary to object to the questioning of counsel as too vague to help develop the record, and directed counsel to be more specific. Thereupon, Mr. Mundy gave the following specific answer even before being shown the partnership provision itself (Tr. 266):

> Q. Are you aware of any prohibition that any document, on your talking to Dr. Stamps about the day to day operation of the radio station?
>
> A. Yes, I can't give him advice, and I'm not going to participate in any of the day to day decisions or activity. I'm aware of that.

And, after being shown the specific partnership language, Mr. Mundy elaborated (Tr. 269-270):

> JUDGE CHACHKIN: Do you recall any discussions with [Counsel] concerning what the meaning of this provision is?
>
> THE WITNESS: [Counsel] discussed the entire agreement with us. Either he or [his partner] I've forgot which one, discussed the entire provision with us. And it was my understanding that, from the discussion, that we would not participate in, be involved in, or have any direction, or have any advice to give the general partner concerning the day to day operations of the station, and that the general partner was the sole authority for operating and running the station.

This testimony shows that the witness was aware of and understood the partnership arrangement including the specific restriction on the activities of the limited partners. The record also establishes that the other two Anchor principals, Dr. Bennett and Dr. Smith, are aware of and accept the partnership restrictions too. (Tr. 298-299, 314-315). Applicants are not required to memorize partnership agreements, but only to know and abide by them.

As to Dr. Stamps' pledge to relocate to Selbyville, his testimony given immediately prior to that cited in the Decision, at paras. 14-15, makes clear that he was referring there to his plans for use of his other residences *on the weekends* and that he fully intended to reside in Selbyville Monday through Friday in order to work at the station. (Tr. 71):

> Q. Now, I notice in your exhibit 2 concerning your integration proposal that you state you will reside in Selbyville or within the proposed city grade contour, Monday through Friday. I take it that you expect to be out on your boat on the weekends? Where do you intend to be on your weekends if not on your boat?
>
> A. That question, since there is no objection to it, I have less and less feelings about the boat, number 1. I mean I don't see a relevance, but it is not for me to say. That boat and that water do not mate very well, and even though I have investigated it, I have decided totally against this boat and that water.
>
> Number two, it is presumptive as to where I would be on Saturday and Sunday. I might be totally in residence in the Selbyville area. I don't know.

In this connection, it is also a plain misreading of the record to state (Decision, para. 25) that Dr. Stamps "has indicated no intent to relinquish any" of his residences. In fact, the record speaks clearly to the contrary (Tr. 74-75):

> Q. What about the yacht in Baltimore? How much time do you spend on that yacht?
>
> A. Practically zero.
>
> Q. You don't spend any time on the yacht either in Baltimore Harbor or out on the Bay?
>
> A. Not in the last year, no.
>
> Q. What about the residence on Cape Cod? What does that consist of?
>
> A. That is waterfront lot. My son lives there full time. It has a house and one -- a house and a cabin. Well, it was a house and a cabin connected. Cabin was recently destroyed by fire.
>
> Q. How much time total have you spent there in the last year?
>
> A. In the investigation of the fire, I guess I spent above five, six days in negotiation with architects and builders. Before that, I may have been there three or four days around Christmas.
>
> Q. And that's all in the last year?
>
> A. Just about. There may have been a few other emergency trips. My declining interest in these two places associate with the death of two wives. And my flavor of going back to either of these places has been lessened.
>
> My wife for 36 years, and I built the house on the Cape. She passed. I don't want to see it. My wife of two and a half years did not wake up one morning on the boat. I lost all feeling for that too. I like my feeling for water so I will probably get rid of this thing and get a boat more suited for the water around Selbyville which would probably [be] a relatively small boat merely for the bays and not for the Baltimore Canyon.

Thus, a fair and complete reading of the pertinent record evidence supports the ALJ's conclusion that the Anchor principals intend to abide by their agreement and that the Anchor integration proposal should be fully credited. In reversing the *I.D.*, the majority improperly lumps

Anchor with the host of sham applicants referred to in the cases cited at Decision, para. 21. But even a cursory review of those cases makes clear that Anchor bears no resemblance to those applicants. As the ALJ correctly held (*I.D.*, para. 41):

> The typical "sham" arrangement features a minority and/or female general partner who has a minor equity interest, minimal financial input and no prior relationship with the non-minority limited partners. Here, on the other hand, all the principals are minority members with equal equity interests, equal financial responsibilities who have known each other over a long period of time. Further, Anchor's Agreement contains the requisite provisions restricting the limited partners to a passive role. There is no evidence that the limited partners have been actively involved in the preparation and prosecution of Anchor's application or would assume an active role if the application was granted.

Indeed, no party to this proceeding even excepts to the ALJ's findings (*I.D.*, para. 10) that Dr. Stamps was the *only* partner to be active in preparation and prosecution of the Anchor application and that *none* of the limited partners had any role whatsoever in these activities. In these circumstances, it is difficult, if not impossible, to perceive *any* similarity between Anchor and the discredited applicants in cases cited by the majority such as *KIST, Corp.*, 102 FCC 2d 288, 292 (1985). *Compare Susan S. Mulkey*, 4 FCC Rcd 5520 (1989).

The majority also errs in accusing Anchor of not "explain[ing] cogently" (Decision, para. 23) why its principals, who in 1978 applied in a corporate form for an FM license in Washington, D.C., have now "switched" to a limited partnership for their Selbyville proposal. *See* Decision, paras. 6-9. In fact, Dr. Stamps specifically explained this decision in very clear terms (Tr. 160-161):

> JUDGE CHACHKIN: Now, could you tell me why -- the reason for the change from what it was formerly to what it is now, what are you proposing today?
>
> THE WITNESS: Well, the answer could go in several directions. Number one, I was the -- yet even at the time of this one, I was the retired person, and I was the most logical one to succeed my previous position.
>
> Number two, during the ensuing ten years even though we met as a group of four friends in the development of the District application, in the ensuing eight years, as I say, I have developed a competent library on broadcasting. I have visited stations. I work with station managers and what not, things not on the formal record, but for personal entitlement. And I have far outdistanced them in the knowledge of radio and broadcasting.
>
> So that there was no question in their minds, because they had done nothing in the meantime for as I say self-improvement or training in this area. There was no question about that. The third thing and the manner in which FCC compares comparative hearing, under this form we would yet -- with the same divisions of ownership, we would get 100 percent integration because I propose to go in full time into this capacity.
>
> Then I guess the fourth thing was the matter of who was going to take the weight. And there was an exchange of total authority, it was exchanged for responsibility, and so the liability. They don't want to share on an unlimited basis on the liability, then they have to give up their authority so I run the whole ship.

Mr. Mundy, who like the other Anchor witnesses had been sequestered, later confirmed Dr. Stamps' testimony (Tr. 270-273):

> Q. And you didn't have any other reason to use a limited partnership for this station other than the fact that counsel recommended this form, correct?
>
> A. Well, there -- there was discussions about this being the form that we were going to use, and there were reasons given for using this form.
>
> * * *
>
> Dr. Stamps was the only one that had -- good fortune smiled upon him, permitted him to retire at this point. He had retired from the University. Drs. Bennett and Smith, they -- they were still in full time medical practices, private practice, and both were still employed as consultants with the Government.
>
> * * *
>
> So, they have full time practices, plus, four or five hours a day to those other public services. I was, I'm a full time practicing lawyer, and everyone knows lawyers have to work harder than doctors, and I --
>
> * * *
>
> Dr. Stamps had the appetite and the time for it. The rest of us simply wanted to be out of the picture or on the sidelines in terms of what was going on with the business operation. We have faith in one another that we would trust the other's judgment.
>
> Now, I -- I can give another example. Dr. Bennett and Dr. Smith and I are in another investment -- in another investment that is kind of a new thing, about the same time Anchor came about. And Dr. Smith is the liaison with that -- with that business. Dr. Bennett and I get reports from him once in awhile. That's about it. That's not a limited partnership; that's a corporation, I believe. And then I have other investments with both of them; I have other investments, so --with others, that I don't involve -- I do not involve myself in my investments.

This testimony by both principals, which is specific, detailed, entirely plausible, and unrebutted by other evidence, was credited by the ALJ who observed the witnesses; it is of course entitled to "great weight". *Broadcast Associates of Colorado, supra*, 104 FCC 2d at 19. Although the majority disclaims that it is questioning the ALJ's favorable credibility findings and asserts it is weighing all of the testimony (Decision, para. 27), in fact, the majority has highlighted only those portions of the testimony keyed upon by the excepting parties to the exclusion of the considerable additional testimony set forth above. Nor has the majority given serious consideration to other pertinent evidence such as the ALJ's unchallenged findings at *I.D.* para. 41, noted above, showing that Dr. Stamps was the only Anchor principal engaged in the active prosecution of the application.

There is nothing inherently suspect in an applicant's choice of business form and indeed the Commission has expressly admonished that it will not "second-guess an applicant's business judgment" in selecting its structure absent extrinsic evidence (which is not present here) that its choice is not made in good faith. *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988). The majority's heavy reliance on the previous broadcast application prosecuted by the Anchor principals would make more sense had that application been a sham; on the contrary, however, it was prosecuted for eight years in good faith, and only adds credence to the *bona fides* of the individuals before us. Moreover, even in the previous application, Dr. Stamps was the only one of the four principals proposing to be integrated (Tr. 49), which is consistent with his plans to be the active manager of the Selbyville station.

In a further attack on Dr. Stamps' pledge to relocate to Selbyville, the majority attaches undue weight to Dr. Stamps' benign statement that he will start a diary of the time he spends at his Virginia residence (Decision, at para. 25) which, he explained, is his current domicile for tax purposes (Tr. 72, 74). Unfortunately, contested comparative proceedings may take years before they are completed, and there is obviously nothing inconsistent or wrong with Dr. Stamps keeping close track of his time spent in Virginia at present and until such time as his Selbyville application may be granted and his promise to move there becomes operative. Indeed, the Commission has explicitly stated with reference to integrated principals who relocate that "[i]t is unrealistic . . . to expect the status of the principals of an applicant to remain static during often lengthy proceedings." *Coast TV*, 4 FCC Rcd 1786 (1989) (Amendment accepted, without comparative penalty, which reported that integrated principal had moved away from the proposed community of license during pendency of Commission appeal). As in *Coast TV*, the important factor here is Dr. Stamps' continuing and unchanged commitment to relocate to Selbyville. Unsatisfied with its efforts to discredit Dr. Stamps' proposal on the basis of his testimony, the majority meanders outside the record to consider the relative tax rates in Virginia and Delaware (Decision at para. 14, and n.7).

A final point concerns the suggestion that Anchor did not observe the financing obligations of its partnership agreement (Decision at paras. 19, 23). All of Anchor's partners testified that the partnership agreement committed each to a $21,250 share of the estimated *prosecution* costs, and that they had separately agreed at the time of the application that each would be obligated to contribute twenty-five percent to the costs of *construction* and *operation* of the station. (Declarations attached to Anchor Opposition to Petition to Enlarge Issues, filed April 27, 1988; tr. 279-281). As in *Victory Media, supra*, where the Commission weighed the totality of record evidence including the unrebutted testimony of the principals as to their intentions in structuring the applicant at the time it was organized, here the undisputed testimony establishes that the Anchor principals have always had a firm understanding as to their obligations regarding prosecution costs as well as construction and operation costs. In short, there is no evidence that they will operate at variance from the partnership agreement.

In sum, the ALJ found that Anchor was composed of four professional men of long standing, who testified truthfully and consistently, and whose previous application and present proposal were made in good faith. We have directed ALJs to ferret out applications that are not legitimate; similarly, we have commended them for engaging "in thorough, critical, but objective review of the factual record" rejecting adversarial contentions which constituted "nothing more than pandering to certain suspicions." *See Utah TV Assn., Ltd.*, 102 FCC 2d 1470, 1473-74 (Rev. Bd. 1985). The present ALJ has demonstrated his ability to separate the shams from legitimate proposals. *See e.g. KIST, supra*, 102 FCC 2d at 290. His efforts in this case should have been met with affirmance rather than reversal.

Note* The subsequent history of *Central Texas, supra*, reveals that reconsideration was denied by the Board at 92 FCC 2d 914 (1982); review was denied by the Commission, FCC 83-415, released September 21, 1983, and the case was affirmed by the D.C. Circuit Court of Appeals *sub nom Blake-Potash Corp. v. FCC*, No. 83-2112, April 26, 1985.

Some five years after our decision, in *Central Texas Broadcasting Co.*, 64 RR 2d 332 (1987), the station was transferred but only after the Commission found that "the station went on the air in March of 1985, that the station's license application was filed in April of 1985, and that it was subsequently approved on October 31, 1985. The station is currently operational and the Petitioners have raised no issues regarding its operation or service to its community of license. In his affidavit, Mann states that, *since the time Central was awarded the construction permit for KXXV, he has met his commitment to be primarily involved with the station's construction and operation. This is corroborated by the affidavit of Robert Good, station manager of KXXV, who has held that position since the summer of 1984.* The Petitioners have submitted no facts to contradict Mann's sworn statements, other than to indicate that they are self-serving. *Instead, they have relied on speculation. . . . The Petitioners have presented no statements by persons having any specific knowledge of his business activities which would demonstrate that Mann has not effectuated his integration commitment." (Id.,* at 335) (Emphasis added).

Thus, contrary to the implications of the Separate Statement, the Commission has determined that both the grant of Central Texas's original application as well as the assignment of license of Station KXXV served the public interest.

SEPARATE STATEMENT
OF
BOARD MEMBER ERIC T. ESBENSEN

It somewhat ironic that the dissent cites as its premier authority *Central Texas Broadasting Co.*, 90 FCC 2d 583 (Rev. Bd. 1982), a case in which the Board majority overturned an ALJ's refusal to award integration credit to a banker-principal who refused to yield up his many banking interests, yet promised full-time integration into his proposed television station. As predicted in Board Member Blumenthal's dissent in that case *(id.,* at 589), the principal awarded the permit on the strength of his dubious permanent integration pledge, did in fact sell the station shortly after it was licensed, pocketing a substantial profit. *Central Texas Broadcasting,* 64 RR 2d 332 (1987) (per delegated authority).

As the dissent in that case stated, integration credit, which (as here) is more often than not dispositive, should not be blithely handed out where substantial evidence raises serious doubts about an integration pledge.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-541

In re Applications of

JUAN GALIANO	File No. BPH-871028MA
JOSEPH BAHR	File No. BPH-871028MB
GUILLERMO A. BONET	File No. BPH-871029MH
RENACER BROADCASTERS CORPORATION	File No. BPH 871029MK
OCCIDENTAL BROADCASTING CORPORATION	File No. BPH-871029MM

For Construction Permit for a
New FM Station on Channel 281A,
Hormigueros, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: March 27, 1990; Released: April 10, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is an appeal filed by Juan Galiano on March 12, 1990, pursuant to Section 1.301(a)(1) of the Commission's Rules, 47 C.F.R. §1.301(a)(1), which seeks reversal of the *Memorandum Opinion and Order*, FCC 90M-426, released March 5, 1990, of Administrative Law Judge Edward Luton (ALJ), dismissing Galiano's application from this proceeding for his failure to demonstrate "good cause" for the late-filing of his Notice of Appearance and requisite hearing fee. The four remaining competing applicants have all filed oppositions to Galiano's appeal.

2. *Background*: The *Hearing Designation Order*, 4 FCC Rcd 8711 (1989) (HDO), in this proceeding was released December 20, 1989. It is undisputed that Galiano (and any other applicant wishing to participate in the hearing), should have filed a Notice of Appearance within 20 days of this release date (and not later than January 9, 1990), pursuant to 47 C.F.R. §1.221(c). However, Galiano did not file his Notice of Appearance and hearing fee until January 19, 1990.

3. Here, and before the ALJ, Galiano (who, at the time, was proceeding *pro se)* submits that he did not receive a copy of the HDO "at his address of record in Homigueros, Puerto Rico until January 17, 1990" (Appeal at 1), and thus had no notice of the 20-day filing requirement. In support of this claim, and in an effort to demonstrate "good cause," Galiano initially submitted a declaration before the ALJ which stated:

> I live on the South West side of the Puerto Rican island. This area of the island was devastated by Hurricane Hugo in the fall of 1989. *Only now, in January, 1990, are such basic services as electricity, water and regular mail deliveries returning to normal.*
>
> Because of these disruptions in the mail service, it was not until January 17, 1990, that I received the [HDO] from the Federal Communications Commission. Until I received this notice, I was unaware that this proceeding had been designated for a hearing.
>
> The next day, on January 18, 1990, I contacted for the first time, and retained my current counsel. Prior to this time I was not represented by counsel.

See Appeal, Att. 1 (emphasis added).

4. In opposition, Occidental Broadcasting Corporation (Occidental) submitted a plethora of documents to the ALJ, including the following: (1) a statement, dated February 1, 1990, of Louis Martinez, the Postmaster of the Town of Hormigueros, Puerto Rico; there, Martinez stated that the only day that the Hormigueros Post Office was closed was September 18, 1989, and that since then the Post Office "has been giving regular service without interruption or disruption of any kind whatever"; (2) a letter from the Consumer Advocate, United States Postal Service, Washington, D.C., dated February 1, 1990, which stated that mail service in the Mayaguez-Hormigueros, Puerto Rico area after Hurricane Hugo "was fully functioning and back in normal shape by the beginning of October at the very latest"; (3) a statement that the Commission's records indicated that the HDO was mailed to Galiano on December 20, 1989 (at 1:57 p.m.) to the address specified in Galiano's application; (4) an affidavit of Occidental's president, Susan Baez-Dixon, dated January 29, 1990, setting forth her belief that Hurricane Hugo struck mainly in the northeastern portion of Puerto Rico and not in the "Western and Southwestern areas of Puerto Rico, where no damage was caused by the Hurricane." She further claimed that: "Our law offices in Mayaguez, Puerto Rico, located on the Western part of Puerto Rico, never ceased operating and never lacked electricity, water and telephone service. Our regular mail delivery was never disrupted. Hormigueros, Puerto Rico, where Mr. Juan Galiano resides is located approximately five miles South of Mayaguez, Puerto Rico. [Further], since the month of September 1989, telephone, telefax, mail, telegraph, electric service, Express Mail, Federal Express and U.P.S. services have been available at all times"; and, (5) a "Statement on Hurricane Hugo (Revised)" dated October 24, 1989, by Israel Matos, Meteorologist in Charge, U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Forecast Office, San Juan, Puerto Rico, wherein Matos indicated that Hurricane Hugo passed over eastern and northeastern Puerto Rico, and not southwest Puerto Rico (as claimed by Galiano). *Memorandum Opinion and Order*, *supra*, at paras. 4-6.

5. Faced with this array of documentation, Galiano altered his claims before the ALJ. In a subsequent declaration (Appeal, Att. 2), Galiano now avers that his

initial statement ("I live on the South West side of the Puerto Rican island. This area . . . was devastated by Hurricane Hugo . . . .") was "inaccurate and is not what I intended to say" (*id.*, at para. 6). Further,

> I intended to state that the east end of Puerto Rico was the area most severely devastated by Hurricane Hugo, not the west end where I live. I believed that such information was relevant to explaining why I did not receive the Hearing Designation Order until January 17 because it was my understanding that mail addressed to me at Hormigueros and sent from the mainland United States would go through San Juan, in eastern Puerto Rico, where the damage from the hurricane was severe.
>
> The inaccurate statement in my Declaration of January 25, 1990 resulted from communication errors between me and my counsel and from the fact that I read the statement too quickly at the time I signed it.

6. Additionally, Galiano's counsel observes (Appeal, pp. 1-2) that, "[o]f course, [Galiano] did not know with certainty that the hurricane was the approximate cause of the later delivery of the HDO. He deduced that . . . . However, the hurricane theory is an unnecessary distraction from the correct resolution of the issue." Thus, Galiano now simply claims that: (1) he did not receive the HDO until January 17, 1990, even though his mail was purportedly checked daily; (2) he therefore did not have actual notice until it was too late for him to timely file the required Notice of Appearance; and (3) he did not have constructive notice of the release of the HDO from either (a) publication of a summary of the HDO in the Federal Register (since the nearest library, at the University of Puerto Rico at Mayaguez "near Hormigueros and Galiano's residence," did not receive the issue of the Federal Register containing the HDO until January 12, 1990), or, (b) local publication by other parties to this proceeding of the newspaper notice required by 47 C.F.R. §73.3594, because two of the parties here did not commence such publication until at least January 10, 1990.[1]

7. In concluding that Galiano's application should be dismissed from this proceeding, the ALJ weighed the statements before him and, despite Galiano's attempt to disengage himself from his initial declaration, observed that:

> One critically important point about the "location of the hurricane damage" is that the location formed the entire basis for Galiano's claim of "good cause" for the acceptance of his Notice of Appearance.

Memorandum Opinion and Order, *supra*, at para. 6. We further note that Galiano's additional sworn statement that "only now, in January 1990, are such basic services electricity, water *and regular mail deliveries* returning to normal" (*id.*, at para. 3; emphasis added) is not only refuted in the documents submitted by Occidental, but Galiano pointedly does not even attempt to explain away these additional, critical inconsistencies. Finally, the ALJ ultimately concluded that (*id.*, at para. 9; emphasis added):

> Absent some indications to the contrary . . . regularity in the delivery of the mail can be presumed. There are no *credible* indications in this case. Galiano has not shown good cause for his failure to timely file his Notice of Appearance.

8. *Discussion*: First, we note that the Commission specifically declared in its *Report and Order*, *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, ("*Fee Collection Order*"), 2 FCC Rcd 947, 985 n. 136 (emphasis added):

> We will not modify the discretion of the law judge to accept late filings *but expect that this discretion will continue to be narrowly exercised* only upon a showing of good cause.

9. Second, in a markedly similar situation in *Silver Springs Communications*, 3 FCC Rcd 5049 (Rev. Bd. 1988),[2] an applicant claimed that it, too, had not received a copy of the HDO until some five days after the date established for the filing of Notices of Appearance. While it was there determined that the applicant's plea for acceptance of late-filing of the Notice and fee was not supported "by affidavit or other evidence," the record there similarly reflected that: (1) the *Hearing Designation Order* and the *Order* assigning the ALJ to preside over this proceeding were mailed to the applicant (some 21 days and 15 days, respectively) prior to the Notice of Appearance due date; (2) one of the applicants there transmitted its Notice of Appearance to the appealing applicant at the same address eight days prior to the deadline for filing the Notice and fees; (3) the ALJ's *Order Prior to Prehearing Conference* was mailed to that applicant at the same address; (4) the *Notice of Designation of the Proceeding for Hearing* was published in the Federal Register some fourteen days prior to the due date; and (5) a public notice of designation of the case for hearing was published in the local newspaper as early as six days prior to the required filing date.

10. In denying that applicant's reinstatement, the *Silver Springs* Board generally adopted the ALJ's determinations set forth in his *Memorandum Opinion and Order*, FCC 88M-1652, released May 31, 1988, where that ALJ had declared (*id.*, at para. 5):

> The Presiding Judge simply cannot accept [the applicant's] self serving and unsupported statement that the *Hearing Designation Order* was not received, and that the applicant did not learn of this case being designated for hearing until May 3, 1988. If the Commission begins entertaining and accepting arguments that letters mailed in Commission proceedings were not delivered, procedural confusion, havoc, and abuse would result. Indeed, the Commission's procedural integrity would be irreparably damaged in this case and in general if [the applicant's] self serving and unsupported contention were accepted.

Further, the ALJ had there concluded that "good cause" had not been demonstrated for late-filing, and he opined (*id.*, at para. 6):

> To hold otherwise would be extremely prejudicial to the other applicants in this proceeding who timely filed their notices of appearance and paid their $6,000 hearing fee. To allow an applicant to wait until after other applicants have filed their notices of appearance and paid their $6,000 hearing fee before deciding whether to participate in the proceeding is extremely prejudicial to the other applicants and amounts to a type of gamesmanship that cannot be tolerated. The rejection of this untimely filed notice of appearance is necessary in order to maintain the integrity of the Commission's Fee Program and to insure that an applicant's gamesmanship does not result in an unfair advantage.

11. Third, the Commission has held repeatedly that an item mailed is presumed to be received by the addressee. *Denver MDS Company*, 2 FCC Rcd 643 (1987); *see also Lakeland Cablevision, Inc.*, 66 FCC 2d 452 (1977); *Midwest Video Corp.*, 43 FCC 2d 262 (1973); *El Paso Cablevision, Inc.*, 27 FCC 2d 835 (1971); *Delaware County Cable Television Co.*, 13 FCC 2d 899 (1968). Here, not only has Galiano failed to adequately rebut this presumption, but Galiano did not even attempt to refute the contradictory showings made in response to his initial, specific claim that mail service did not return to normal until at least January 1990.

12. In sum, considering that ALJ's must narrowly exercise their discretion to accept such late filings (and only upon a demonstration of "good cause"), and that there are sound public interest considerations to prevent "gamesmanship" in comparative hearing proceedings that could result from such late-filings, we hold that the ALJ's dismissal of Galiano's application was appropriate.

13. ACCORDINGLY, IT IS ORDERED, That the Appeal filed by Juan Galiano on March 12, 1990 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Applicant Joseph Bahr (Bahr) further posits that Galiano should also been on notice of the release of the HDO because of a subsequent *Order*, FCC 89M-2827, released December 26, 1989, designating the Presiding Judge and setting dates for a preharing conference and the actual hearing, as well as a Notice of Appearance of Guillermo A. Bonet, served on all parties on January 4, 1990. (Bahr also observes that he, Occidental and Renacer Broadcasters Corporation also served Notices of Appearance on Galiano on January 8 and January 9, 1990).

[2] *Review denied*, 4 FCC Rcd 4917(1989). Galiano also argues (Appeal at 5) that an "appropriate and compelling precedent" is the Commission's reinstatement of an applicant who did not timely file a Notice of Appearance in *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988). In that proceeding, all the remaining parties had entered into a universal settlement agreement *prior* to the date Notices of Appearances were required to be filed. While specifically rejecting the dismissed applicant's argument that it would be "unfair" to dismiss its application because it was unaware of the deadline (citing the clear provisions of 47 C.F.R. §1.221), the Commission there observed (*id.*, at para. 6):

> Under these circumstances -- where the parties have entered into a universal settlement, the proceeding is being terminated, and there will be no prejudice to other parties or the public -- it is appropriate that leniency attach to the requirement for filing the notice of appearance, and settlement agreements can be approved contingent on the filing of the required notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEPHONE AND DATA SYSTEMS, INC. AAD 9-1941

Waiver of the Definition of "Study-Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1990; Released: April 9, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 9, 1988, Telephone and Data Systems, Inc. (TDS) filed a letter on behalf of its wholly-owned subsidiary local exchange companies Badger State Telephone Company (Badger State) and Greenwood Telephone Company (Greenwood) requesting an interpretation of Part 36 of the Commission's Rules relating to the definition of "study area."[1] TDS requests this interpretation in order to change its study area in conjunction with the merging of Badger State and Greenwood. We will treat TDS's request as a Petition for Waiver, and to the extent discussed below, we grant this waiver.

2. The definition of study area contained in Part 36, Appendix-Glossary, of the Commission's Rules states that the boundaries of a study area shall be frozen as they were on November 15, 1984. Thus, to form a new study area for Badger State and Greenwood, TDS requests a waiver of that provision.

II. SUMMARY OF PETITION

3. TDS indicates that in 1988 Badger State served 3,759 subscribers and Greenwood served 1,318 subscribers.[2] It states that Badger State's 1988 non-traffic sensitive (NTS) cost per loop was $273.40, Greenwood's 1988 NTS cost per loop was $251.93, and the weighted average 1988 NTS cost per loop was $267.97. TDS also notes that Badger State received $11,691 in annual Universal Service Fund (USF) support, while Greenwood received no USF support for 1988.

4. Badger State and Greenwood converted from a cost basis to an average schedule basis [3] for interstate compensation on April 1, 1989.[4] As a result of this conversion, TDS maintains that the newly merged company no longer qualifies for USF support, and no USF support is expected in the future.

5. The merging of the Badger State and Greenwood study areas, according to TDS, would allow Greenwood, a one exchange company, to use remote switching from Badger State facilities resulting in significant plant upgrade savings. In addition, TDS states that a merged study area will benefit customers by allowing savings on cost studies, audit work, network integration and administration generally.

III. DISCUSSION

6. We have considered the petitioner's arguments and conclude that TDS should be allowed to reconfigure its study area boundaries to reflect the merger of the Badger State and Greenwood Telephone Companies. The Commission adopted the requirement that study area boundaries be frozen to prohibit companies "from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support."[5] On the other hand, there are other instances of study area changes that do not conflict with the Commission's original concern. These include the merging of two or more study areas into a single study area or changes in study areas that result from the purchase or sale of exchanges in arms-length transactions. In these cases, a waiver may be justified if there is a minimal impact on USF support. In addition, we believe that a carrier that is either merging or buying or selling exchanges should notify the state commissions which have regulatory authority over them prior to seeking a waiver of the rules relating to study area boundaries. In that way, we can address any state concerns.

7. In this case, Badger State received some high cost funds and Greenwood received no high cost support for 1988. Beginning on April 1, 1989, however, TDS indicates that the newly merged company will receive no high cost support for the remainder of 1989 and for 1990. Additionally, the Wisconsin Public Service Commission had been notified of this merger, and has not opposed TDS's waiver request. Consequently, it is our belief that this merger does not conflict with the intent of the Commission in freezing study areas. Accordingly, we waive the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 C.F.R. §154(i), That in regard to TDS's request for interpretation, a waiver of the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §36, Appendix-Glossary.

[2] In TDS's Errata to its Request for Interpretation, filed March 2, 1990, TDS states that Badger State currently has 3,836 access lines and Greenwood has 1,312 access lines.

[3] An average schedule company is a company that does not conduct separations studies to develop its interstate costs. Instead, it is reimbursed for its interstate costs through payments computed by the National Exchange Carrier Association pursuant to Section 69.606 of the Commission's Rules, 47 C.F.R. §69.606.

[4] TDS Errata at page 1.

[5] MTS and WATS Market Stucture, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65, (December 12, 1984) (*Joint Board Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CHEQUAMEGON TELEPHONE COOPERATIVE, INC. AAD 9-1942

Waiver of Sections 36.154(e)(1) and (2), and the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1990; Released: April 9, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On December 16, 1988, Chequamegon Telephone Cooperative, Inc., (Chequamegon) filed a letter requesting an interpretation of Part 36 of the Commission's Rules relating to the definition of "study area,"[1] and of Sections 36.154(e)(1) and (2)[2] of the Commission's Rules. Chequamegon requests this interpretation in order to change its study area in conjunction with the purchase of two telephone exchanges, Benoit and Cornucopia, from Wisconsin Bell, Inc. We will treat Chequamegon's request as a Petition for Waiver, and to the extent discussed below, we grant this waiver.

2. The definition of study area contained in Part 36, Appendix-Glossary, of the Commission's Rules states that the boundaries of a study area shall be frozen as they were on November 15, 1984. Thus, to include the Benoit and Cornucopia exchanges into its existing study area, Chequamegon requests a waiver of that provision.

3. Chequamegon also requests permission to modify certain historical jurisdictional separations factors to reflect the new study area configurations. Section 36.154 of the Commission's Rules prescribes the procedures to be followed in apportioning Exchange Line Cable and Wire Facilities, Category 1, between the state and interstate jurisdictions. Category 1 is first subdivided into three subcategories. Subcategory 1.1 consists of state private line and state WATS lines, subcategory 1.2 consists of interstate private line and interstate WATS lines, and subcategory 1.3 consists of subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services. Sections 36.154(e)(1) and (2) define the procedures for the development of the interstate allocation factor known as the subscriber plant factor (SPF), which is used to determine the interstate portion of subcategory 1.3. The SPF is developed by use of calendar year 1981 subscriber line usage data. Section 36.154 of the Commission's Rules also reflects the Commission's decision to change the allocation factor for Subcategory 1.3 from SPF to 25 percent, and to phase in the change by 1993. The objective of the transition is to produce reasonable and fair results in conjunction with the Commission's access charge plan and allow the targeting of rate support to high cost areas. Under these rules the interstate SPFs were frozen at the 1981 levels until 1986, when the gradual transition to a 25 percent factor began.

4. Chequamegon requests a waiver of Section 36.154(e)(1) and (2) to adjust the frozen interstate SPF for the new consolidated study area. In lieu of using Wisconsin Bell's frozen 1981 SPF for Benoit and Cornucopia and its frozen 1981 SPF for Chequamegon, it proposes to use existing data to compute a new base year SPF [3] for the newly merged company study area.

II. SUMMARY OF PETITION

5. Chequamegon indicates that before the acquisition of Benoit and Cornucopia, Chequamegon had a total of 5,473 access lines. The newly merged company has 6,057 access lines.[4]

6. It states that it did not receive any high cost support for 1989, and it does not expect to receive high cost support in 1990, as a consequence of its acquisition of Benoit and Cornucopia.

7. Furthermore, Chequamegon claims that without the acquisition of the Benoit and Cornucopia exchanges, Chequamegon had a frozen, 1981 interstate SPF of .42659, while incorporating the two exchanges into the newly merged study area reduces the interstate SPF to .40840.

8. The extension of the current Chequamegon study area to include Benoit and Cornucopia, according to Chequamegon, will benefit customers by allowing savings on cost studies, audit work, network integration and administration generally.

III. DISCUSSION

9. We have considered the petitioner's arguments and conclude that Chequamegon should be allowed to reconfigure its study area boundaries to include the Benoit and Cornucopia exchanges, to adjust the jurisdictional allocation factors for local loop plant for the new study area formed by Chequamegon, Benoit and Cornucopia, and to recast certain historical data necessary to reflect the new study area boundaries. Accordingly, we waive the definition of "study area" set forth in Part 36, Appendix-Glossary, and Sections 36.154(e)(1) and (2) of the Commission's Rules.

10. The Commission adopted the requirement that study area boundaries be frozen to prohibit companies "from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support."[5] On the other hand, there are other instances of study area changes that do not conflict with the Commission's original concern. These include the merging of two or more study areas into a single study area or changes in study areas that result from the purchase or sale of exchanges in arms-length transactions. In these cases, a waiver may be justified if there is minimal impact on USF support. In addition, we believe that a carrier that is either merging or buying or selling exchanges should notify the state commissions which have regula-

tory authority over them prior to seeking a waiver of the rules relating to study area boundaries. In that way, we can address any state concerns.

11. In this case, Chequamegon received no high cost support for 1989, and it has indicated that it will receive no high cost support for the newly merged company in 1990. Furthermore, the Wisconsin Public Service Commission had been notified of this sale, and has not opposed Chequamegon's waiver request. Therefore, we believe that a waiver of the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules is justified.

12. Chequamegon also indicates that with the addition of Benoit and Cornucopia to the existing Chequamegon study area, its SPF should be changed. It submits that the revised 1981 base year SPF for the new study area would be .40840,[6] compared with .42659 for the existing Chequamegon study area. In addition, Chequamegon notes that the composite SPF for 1989 for the new study area would be .32920, compared with its current SPF of .33830. In either case, our rules call for a transition to .25 by 1993. Consequently, since the new SPF will have minimal effect on the assignment of costs between the state and interstate jurisdictions, we believe that a grant of the waiver of Sections 36.154(e)(1) and (2) of the Commission's Rules to the extent necessary to adjust the frozen interstate SPF for the new study area consisting of Chequamegon, Benoit and Cornucopia is justified.

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 C.F.R. §154(i), That in regard to Chequamegon's request for interpretation, a waiver of Sections 36.154(e)(1) and (2), and the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §36, Appendix-Glossary.

[2] 47 C.F.R. §§36.154(e)(1) and (2).

[3] The new base year SPF will be adjusted to reflect the transition prescribed by Section 36.154(f) of the Commission's Rules.

[4] Chequamegon filed additional information concerning this acquisition in its letter of February 15, 1990, in response to questions raised by the Accounting and Audits Division in its letter of February 5, 1990.

[5] MTS and WATS Market Stucture, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65, (December 12, 1984) (*Joint Board Order*).

[6] In its Errata to its Request for Interpretation, filed March 8, 1990, Chequamegon proposes to use existing data to compute the 1989 base year SPF because that is the first year in which Chequamegon, Benoit and Cornucopia will operate as one company. Chequamegon indicates that it uses Chequamegon's 1981 subscriber line usage (SLU) of 4,817,395 minutes and Benoit's and Cornucopia's combined 1981 SLU of 427,996 minutes, as a weighting factor, to recompute the SPF as if Chequamegon, Benoit and Cornucopia were one company in 1981. Consequently, the revised SPF of .40840 represents the new study area as if it had been in existence in 1981.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WISCONSIN BELL, INC. AAD 9-1943

Petition for Waiver of the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1990; Released: April 9, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On February 22, 1990, Wisconsin Bell, Inc., (Wisconsin) filed a petition seeking waiver of the definition of "study area" set forth in Part 36, Appendix-Glossary,[1] of the Commission's Rules. Wisconsin requests this waiver in order to change its study area in conjunction with the sale of two telephone exchanges, Benoit and Cornucopia, to Chequamegon Telephone Cooperative, Inc.

2. The definition of study area contained in Part 36, Appendix-Glossary, of the Commission's Rules states that the boundaries of a study area shall be frozen as they were on November 15, 1984. Thus, to remove the Benoit and Cornucopia exchanges from its existing study area, Wisconsin requests a waiver of that provision.

II. SUMMARY OF PETITION

3. Wisconsin notes that it serves approximately 1.6 million residential and business access lines in the state of Wisconsin. In addition, it indicates that the total access lines of these two exchanges totaled approximately 640 business and residential lines or .0004 of Wisconsin's total access lines.

4. Wisconsin states that it did not receive any high cost support for its study area before the sale of Benoit and Cornucopia. It maintains that the average loop cost for its entire study area before the sale was $199.63, and after the sale of the exchanges, the average loop cost decreases to $199.56. Accordingly, with the nationwide average loop cost of approximately $229.46, Wisconsin concludes that it still does not qualify for high cost support after the sale of the two exchanges.

5. Furthermore, Wisconsin claims that this sale will have no impact on its frozen Subscriber Plant Factor (SPF)[2], and the transition to the 25% gross allocator. [3] Wisconsin, therefore, does not seek any change in either its frozen SPF or its present transition to the 25% gross allocator.

6. Wisconsin believes that the waiver is in the public interest because "the sale allowed for earlier and more economical modernization to central office equipment and provided for Equal Access capabilities without an increase in rates."[4]

III. DISCUSSION

7. We have considered petitioner's arguments and conclude that Wisconsin should be allowed to reconfigure its study area boundaries to remove the Benoit and Cornucopia exchanges. The Commission adopted the requirement that study area boundaries be frozen to prohibit companies "from setting up high cost exchanges within their existing service territory as separate companies to maximize high cost support."[5] On the other hand, there are other instances of study area changes that do not conflict with the Commission's original concern. These include the merging of two or more study areas into a single study area or changes in study areas that result from the purchase or sale of exchanges in arms-length transactions. In these cases, a waiver may be justified if there is minimal impact on USF support. In addition, we believe that a carrier that is either merging or buying or selling exchanges should notify the state commissions which have regulatory authority over them prior to seeking a waiver of the rules relating to study area boundaries. In that way, we can address any state concerns.

8. In this case, Wisconsin received no high cost support before the sale, and it is clear that it will receive no high cost support as a result of the sale. In addition, this sale will have no effect on Wisconsin's SPF. Furthermore, the Wisconsin Public Service Commission had been notified of this sale, and has not opposed Wisconsin's waiver request. Therefore, we believe that a waiver of the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules is justified.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 C.F.R. §154(i), That Wisconsin's petition for waiver of the definition of "study area" set forth in Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §36, Appendix-Glossary.

[2] The Subscriber Plant Factor (SPF) is used to determine the interstate portion of subcategory 1.3, that is, the subscriber or common lines that are jointly used for local exchange service and exchange access for state and interstate interexchange services contained in Section 36.154 of the Commission's Rules.

[3] Wisconsin notes that its frozen 1983 SPF is .2201 and is currently at .2388 for 1990 as it is being transitioned to .25 by 1993.

[4] Wisconsin Bell Inc.'s Petition for Waiver, page 4.

[5] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para 65, (December 12, 1984) (*Joint Board Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FLANIGAN'S FURNITURE, INC.,
et. al
Complainant,

v.

NEW YORK TELEPHONE COMPANY and AMERICAN TELEPHONE AND TELEGRAPH CO.
Defendants.

File No. E-88-56
File No. E-88-57

ORDER

Adopted: March 30, 1990; Released: April 10, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. Flanigan's Furniture, Inc., et. al ("Flanigan's") filed a formal complaint against New York Telephone ("NYT") on February 25, 1988, and against American Telephone and Telegraph Company ("AT&T") on March 4, 1988, alleging that NYT and AT&T were in violation of Sections 201(b), 202(a) and 203(c) of the Communications Act. The alleged violations concerned charges assessed by the two companies against Flanigan's for service provided on private line circuits located within New York State. Numerous other pleadings have been filed in both complaint proceedings.

2. The parties to the above-captioned complaint have conducted discussions, including consultations with members of the Enforcement Division aimed at settling the complaints. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On March 27, 1989, the parties filed joint motions to dismiss the complaints against NYT (File No. E-88-56) and AT&T (File No. E-88-57). We are satisfied that dismissal of the complaints with prejudice will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the motions to dismiss the above-captioned complaints ARE GRANTED.

4. IT IS FURTHER ORDERED that these complaints (File Nos. E-88-56 and E-88-57) ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 10, 1990

SOUTHWESTERN BELL FILES A PETITION FOR WAIVER OF PART 36 RULES RELATING TO THE ALLOCATION OF DEPRECIATION EXPENSE AND ACCUMULATED DEPRECIATION

PUBLIC COMMENT INVITED

On March 15, 1990, Southwestern Bell Telephone Company (SWB) filed a petition for waiver of Sections 36.361 and 36.503 of the Commission's Rules, which prescribe the procedures carriers use to allocate Depreciation and Amortization Expense and Accumulated Depreciation between the interstate and state jurisdictions. SWB states that its intrastate allocation factors for the reserve imbalance amortization have been frozen at 1986 levels by the Oklahoma Corporation Commission. SWB requests that the Commission allow it to apply a frozen interstate allocation factor, rather than the prescribed usage-sensitive factor, so that it may fully recover its reserve imbalance amortization.

Parties may file comments on SWB's petition no later than **April 25, 1990.** Replies should be filed by **May 7, 1990.** Comments should reference AAD 90-1. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. A Copy of SWB's petition is available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 89-608

In the Matter of

NEBRASKA REGION PUBLIC SAFETY PLAN

ORDER

Adopted: April 3, 1990; Released: April 10, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On December 11, 1989, the Nebraska Area (Region 26) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Region 26 plan was placed on Public Notice for comments on December 27, 1989, 54 FR 52995 (Dec. 26, 1989). The Commission received comments from the Region 7 Planning Committee (Colorado) and reply comments from the Region 26 Planning Committee (Nebraska).

3. Colorado had two concerns.[1] First, it was concerned that use of tone coded squelch frequencies, other than 156.7 Hz on the mutual aid channels, would prohibit out of region units from communicating in Region 26. Second, it stated that the loading standards proposed in Region 26 were not in compliance with the Commission's National Public Safety Plan as specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987). In its reply comments, Nebraska states that it is requiring that all equipment be capable of operating on the national tone squelch of 156.7 Hz. With regard to loading, it notes that the National Plan provides some flexibility to accommodate different needs and asks that the Commission consider its proposed loading standards.

4. The Commission's intent with regard to the mutual aid channels is to provide the capability for all public safety agencies to be able to communicate with one another. Therefore, it is essential that all equipment operating in this band be equipped with the same tone squelch frequency. The Nebraska Plan satisfies this requirement. We are not opposed to Nebraska's desire to put additional controls on specific repeaters by using additional tone squelch frequencies as long as units from other regions can communicate with agencies in Region 26 on the mutual aid channels.

5. With regard to loading, the Nebraska plan states that a trunked system must be loaded with a minimum of 70 mobiles per channel. As the number of channels increases, the loading requirements increase, up to 95 mobiles per channel on a 16-20 channel system. In the *Report and Order* in Gen. Docket No. 87-112, the Commission adopted the existing 800 MHz standards for both trunked and conventional systems. Section 90.631(b) of the Commission's Rules, 47 C.F.R. § 90.631(b), provides that as of the five-year anniversary date of its initial license grant, a trunked system that received its initial license grant before June 1, 1993, must be loaded to a minimum of 70 mobiles for each channel authorized. If it is not, Section 90.631(b) provides that licenses for all channels not loaded to 100 mobile stations per channel cancel automatically if the trunked system is in a geographic area where all channels are assigned in the licensee's category. In the *Report and Order* in Gen. Docket No. 87-112, however, the Commission provided some flexibility to accommodate different perceived public safety needs in different parts of the country, stating that it would waive its loading standards when a compelling case for waiver is made. Therefore, the existing Commission standards will apply unless a specific standard is requested by a regional plan; in those cases, each standard will be considered on its own merit.

6. In the case of the Nebraska Plan, the proposed standards require greater loading than the Commission's rules. It is clear, however, from the context of the plan that both the Nebraska and Colorado regions believe that the Nebraska plan's standards are lower than the Commission's rules and thus easier to meet. It would in fact be more burdensome on the Nebraska Region to conform to its plan's proposed loading standards than to conform to the Commission's rules. Therefore, we are accepting the plan subject to Section 4.3 being revised to state that trunked systems in Region 26 must comply with the loading standards outlined in the Commission's rules, § 90.631.

7. We have reviewed the plan submitted for Region 26 and find that, other than as stated above, it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Nebraska.

8. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 26 IS ACCEPTED, as amended. Furthermore, licensing of the 821-824/866-869 MHz band in Region 26 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Bruce A. Franca
Deputy Chief Engineer

FOOTNOTE

[1] The Colorado Planning Committee was also concerned that the frequency allotment used by Region 26 resulted in some adjacent region frequency conflicts. These conflicts have been resolved. *See* February 12, 1990, letter from Mr. Douglas C. Noe, Chairman Region 7 Planning Committee.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-146

In re Applications of

JAMES POLLOT ET AL., d/b/a POLLOT COMMUNICATIONS LTD (hereafter "Pollot") File No. BPH-880217MU

PALMYRA BROADCASTING CORPORATION (hereafter "PBC") File No. BPH-880217NH

For Construction Permit for a New FM Station on Channel 259A (99.7 MHz) in Palmyra, New York

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 10, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. On September 29, 1989, Pollot petitioned for leave to amend its application to specify a new transmitter site. Similarly, on July 10, 1989, PBC filed a petition for leave to amend its transmitter site. The accompanying amendments were filed after the last date for filing minor amendments as of right. Both applicants stated that they would not be able to secure a "Determination of No Air Hazard" clearance for their proposed towers. We agree that Pollot and PBC have made the requisite good cause showing, pursuant to 47 C.F.R. § 73.3522(a)(2), for acceptance of their late-filed amendments. Consequently, the amendments filed by PBC and Pollot are accepted for filing. However, an applicant may not improve its comparative position after the time for filing minor amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.[1]

3. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	DATE AMENDMENTS FILED
PBC	June 8, 1988; November 28, 1988

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if either.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Pollott and PBC ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That Pollot shall submit the clarifying amendment requested in paragraph 2, footnote 1 above to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] We note that although this amendment meets all of our acceptability criteria, Pollot has failed to respond to Item 2(a), Section V-B of Form 301, which requests specification of the exact location of the proposed antenna including an address if applicable. Accordingly, Pollot shall file an amendment specifying the required information with the presiding Administrative Law Judge within 30 days of the release of this Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-205

In the Matter of

Amendment of Part 80 of the Rules to recognize the North Pacific Marine Radio Council (NPMRC) as the frequency coordinator for the Puget Sound Area and to establish procedures for recognizing frequency coordinators in the future. RM 6886

NOTICE OF PROPOSED RULE MAKING

Adopted: March 29, 1990; Released: April 10, 1990

By the Commission:

I. INTRODUCTION

1. This Notice of Proposed Rule Making proposes to amend the Maritime Services Rules, 47 C.F.R. Part 80, to recognize the North Pacific Marine Radio Council (NPMRC) as the frequency coordinating committee for very high frequency (VHF) private coast stations located in the Puget Sound Area and to establish procedures for recognizing frequency coordinators in the future. This proceeding was initiated by a Petition for Rule Making, RM No. 6886, filed by NPMRC. *See* FCC Public Notice Report No. 1786, released July 17, 1989. No objection to the NPMRC petition has been filed.

II. BACKGROUND

2. Marine VHF frequencies in areas with significant boating activity are congested. Congestion in these areas is especially heavy on frequencies available for private coast stations because these frequencies are available on a shared basis, are limited in number, and are used by a large group of eligibles.[1] The Commission's Rules allow for the recognition of frequency coordinating committees to assist applicants for private coast stations in requesting frequencies that will result in the least amount of interference to other proposed and existing stations.[2] Further, while there is no general coordination requirement for licensing private coast stations, applicants desiring to locate in an area served by a Commission recognized frequency coordinating committee must submit with their license applications a report indicating the degree of probable interference. The report may be based on their own field studies or on statements from the frequency coordinating committee. [3] Under the current rules, organizations desiring to be recognized as frequency coordinating committees must submit their requests to the Commission. Such requests must describe the composition of the committee, the area to be coordinated, and how the organization is representative of all persons who are eligible for VHF private coast stations in the area in question.[4] To date, the Commission has recognized one such coordinating committee, the Southern California Marine Radio Council (SCMRC), for the heavily congested Southern California area.[5]

3. The NPMRC first approached the Commission about becoming a frequency coordinating committee in a letter from its Vice President to the Licensing Division of the Commission's Private Radio Bureau dated March 14, 1989. In that letter, the NPMRC described its purpose, organization, membership and pointed out that it is a non-profit organization headquartered in Seattle, Washington. The NPMRC proposed to be a frequency coordinator for classes of stations other than VHF private coast stations in an area coterminous with the Commission's Seattle Region. In a letter dated April 28, 1989, the Chief, Aviation and Marine Branch, requested NPMRC to clarify the scope of its request with respect to the classes of stations proposed for coordination and the size of the area it wished to serve.[6]

4. NPMRC replied by letter to the staff's request on June 1, 1989, and limited its request to coordination of VHF private coast station applications and designated the area to be served as the following counties of the State of Washington: Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom.[7] We are treating this letter as NPMRC's Petition for Rule Making for purposes of this proceeding. NPMRC stated that approximately 400 private coast stations are currently licensed in those counties. NPMRC proposes to provide the following services:

a. Review license applications for completeness, proper eligibility, technical requirements, and equipment for type acceptance.

b. Provide frequency coordination consistent with good engineering practice.

c. Provide recommendations to users on transmitter technical parameters, such as frequency, power, antenna type, and directional orientation when applicable.

d. Determine channel loading and maintain records of channel loading at various points in the Puget Sound area so that traffic study assignments can be completed and frequency specifications can be based on more than just numbers of licensees per channel.

e. Respond to licensees' complaints and work with the local Commission Field Operations Bureau office in resolving problems before notices of violations are required.

III. DISCUSSION

5. As NPMRC points out, the private coast station channels in the Puget Sound area are heavily congested, with approximately 400 private coast stations currently licensed in the area. The benefits of employing frequency coordinating committees to minimize interference in areas where many users operate on shared frequencies, as is the case here, are well recognized. For example, in 1982 Congress amended the Communications Act[8] to recognize the role frequency coordinating committees play in the spectrum management process and the value of assistance

provided by these committees. Further, our experience with coordinating private coast stations in the Marine Services supports employing such committees in the frequency selection process in other congested areas.[9] Finally, we have NPMRC's showing, which indicates that NPMRC is representative of private coast station users in the area.[10] For these reasons, we propose to amend Section 80.514 of the rules, 47 C.F.R. § 80.514, to specify NPMRC as the marine VHF frequency coordinating committee for private coast stations operating in the following counties in the State of Washington: Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston and Whatcom. In lieu of submitting its application through NPMRC, an applicant may at its option submit a report, based on a field study, indicating the degree to which a grant of its application would cause interference to existing stations operating in the area.[11] Because applicants would have an alternative means of meeting the frequency coordination requirements, we are not proposing oversight of coordinator responsibilities, fees, and performance. Nevertheless, we specifically request comments on this matter.

6. We are proposing to recognize this particular coordinating committee by conducting a notice and comment rule making. If the demand for private coast stations continues to increase, we anticipate receiving additional requests from organizations for recognition as frequency coordinating committees. In fact, the rapidly increasing demand for marine communications coupled with the increasing sophistication in technology will make coordination in the future a necessity if licensees are to continue operating in an efficient manner. Because the benefits provided by coordinating committees in the spectrum management process are clear, and because applicants will have an alternative method of meeting coordination requirements (*i.e.*, a field study), we see no need to conduct a rule making proceeding for every request for recognition as a frequency coordinating committee for private coast stations. We propose, therefore, to establish the following rules for processing any future request under Section 80.513(c)(2) of the rules for recognition as a frequency coordinating committee. We will place all such requests on public notice and allow thirty days for comments. If the organization meets the provisions of Section 80.513(c)(2) and no substantive issues are raised in comments, a notice and comment proceeding will be considered unnecessary. In a brief order issued by the Chief, Private Radio Bureau under delegated authority the organization will be added to the list of recognized coordinating committees under Section 80.514.

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

7. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), our initial analysis is as follows:

8. *Reasons for Action*. This action is being taken to coordinate VHF frequency assignments of private coast stations in the Puget Sound area.

9. *Objectives*. The proposed action would reduce interference to new and existing private coast stations.

10. *Legal Basis*. The proposed action is authorized under Sections 4(i) and 303(f) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f) and (r).

11. *Reporting, Recordkeeping and Other Compliance Requirements*. Private coast station applicants would be required to include in their applications for new or modified stations a field study or a statement from the recognized frequency coordinating committee. Currently, frequency coordination is not required in the Puget Sound area.

12. *Federal Rules which Overlap, Duplicate, or Conflict with this Rule*. None.

13. *Description, Potential Impact, and Number of Small Entities Involved*. The only impact of this proposal will be on private coast station applicants and licensees. While the requirement will be an incremental addition to the application, the Commission expects the proposals to be beneficial to small entities in light of the reduced interference potential. There are currently approximately 400 licensees providing private coast station service in the Puget Sound area.

14. *Any Significant Alternatives Minimizing the Impact on Small Entities and Existing Licensees and Consistent with the Stated Objective*. The applicant will have the option of submitting a field study report as an alternative to obtaining a frequency coordination recommendation from a recognized frequency coordinating committee.

V. PROCEDURAL MATTERS

15. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on a small number of licensees. Implementation of any new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a), 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* Section 1.1202(f), 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* Section 1.1203, 47 C.F.R. § 1.1203.

17. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* Section 1.1202(b), 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of that presentation under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the

particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

18. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* Section 1.1206, 47 C.F.R. § 1.1206.

19. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **June 4, 1990** and reply comments on or before **June 19, 1990.** All relevant and timely comments will be considered by the Commission before taking final action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

20. A copy of this NPRM shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 80 - STATIONS IN THE MARITIME SERVICES

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.514 of the rules is amended by adding a new paragraph (b) to read as follows:

§ 80.514 Marine VHF frequency coordinating committee(s).

* * * * *

(b) The North Pacific Marine Radio Council serves the following counties in the State of Washington: Clallam, Island, Jefferson, King, Kitsap, Mason, Pierce, San Juan, Skagit, Snohomish, Thurston, and Whatcom.

FOOTNOTES

[1] Private coast stations serve the operational, maritime control and business needs of ships by providing a ship-to-shore communications service. They are not open to public correspondence. *See* Section 80.5 of the Rules, 47 C.F.R. § 80.5.

[2] The functions of such coordinating committees are purely advisory and any recommendations are not binding on either applicants or Commission. *See* Section 80.513(c)(2) of the Rules, 47 C.F.R. § 80.513(c)(2).

[3] *See generally* Section 80.513 of the Rules, 47 C.F.R. § 80.513.

[4] *See* Section 80.513(c)(2) of the Rules, 47 C.F.R. § 80.513(c)(2).

[5] *See* Section 80.514(a) of the Rules, 47 C.F.R. § 80.514(a).

[6] *See* Letter from Robert E. Mickley, Chief, Aviation and Marine Branch, Private Radio Bureau to NPMRC (April 28, 1989).

[7] *See* Letter from Harry N. Hutchins, President, NPMRC, to Robert E. Mickley, Chief, Aviation and Marine Branch, Private Radio Bureau (June 1, 1989).

[8] The Communications Amendments Act of 1982, P.L. 97-259, 96 Stat. 1087, September 13, 1982. Section 331 of the Communications Act of 1934, as amended, is codified at 47 U.S.C. § 332.

[9] For example, the Southern California Marine Radio Council is the Commission-recognized coordinator for private coast stations in the Southern California area. It has done a good job of reducing interference since it was appointed in 1987.

[10] The Conference Report accompanying the 1982 Communications Amendments Act placed special emphasis on Commission recognized coordinating committees being representative of the end users. *See* Conference Report No. 97-765, 97th Cong. 2nd Sess., August 19, 1982, at 7 *reprinted* in 1982 U.S. Code Cong. and Ad. News 2237.

[11] *See* Section 80.513(a) of the Rules, 47 C.F.R. § 80.513(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH COMPANY — FOIA Control No. 88-190

On Request for Inspection
Of Records

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1990; Released: April 10, 1990

By the Commission: Commissioner Duggan not participating.

1. The American Telephone and Telegraph Company (AT&T) seeks review of the Common Carrier Bureau's letter partially denying AT&T's Freedom of Information Act (FOIA)[1] request. AT&T sought limited access, pursuant to a protective order, to certain information that MCI Telecommunications Corporation (MCI) and US Sprint Communications Company (US Sprint) had submitted to the Commission in response to paragraph 45 of the Commission's *Memorandum Opinion and Order* in CC Docket No. 88-471.[2] More particularly, AT&T requested disclosure of Attachments B and F to MCI's Direct Case and all of the information that US Sprint had submitted. The Bureau concluded that MCI's Attachment B should be made available but otherwise denied AT&T's request. AT&T requests review of this decision, asking that some of the information be made available in aggregate form. MCI and US Sprint oppose AT&T's application for review.

BACKGROUND

2. In the Tariff FCC No. 15 *Investigation Order*, the Commission initiated an investigation into the lawfulness of AT&T's Holiday Rate Plan (HRP), a discounted tariff offering initially directed at a single customer, the Holiday Corporation (Holiday). The Commission ordered MCI and US Sprint to submit information regarding their single customer offers for the purpose of providing "a clear picture of the extent of this practice and its circumstances." *Investigation Order* at para. 39. In Attachment B, MCI provided information detailing its own discounted offer to Holiday. This offer preceded, and apparently occasioned, AT&T's counter-offer to Holiday. In Attachment F, MCI also provided data concerning discounted off-tariff discounts made available to other individual customers. Likewise, US Sprint submitted material pertaining to discounts it provides to single customers and waivers of some of its tariffed charges. MCI and US Sprint sought confidentiality for these submissions.

3. On November 2, 1988, AT&T filed an FOIA request seeking access to MCI's and US Sprint's submissions. AT&T assumed that this information was exempt from mandatory disclosure under FOIA Exemption 4.[3] Nevertheless, it contended that because the information contained in these documents was relevant to the issues before the Commission in the Tariff F.C.C. No. 15 proceeding, public policy reasons warranted disclosure of the data. In support, AT&T noted that the Commission had recognized in the *Investigation Order* that the lawfulness of the other carriers' single customer pricing practices should be considered in the proceeding and that such consideration required evaluation of the information that MCI and US Sprint submitted. AT&T contended that interested parties could not submit informed comments regarding MCI's and US Sprint's pricing practices without access to this information. Additionally, AT&T maintained that disclosure of Attachment B was necessary in order for AT&T to respond to MCI's allegations concerning AT&T's Holiday Rate Plan, contained in Tariff F.C.C. No. 15. AT&T proposed that this information be made available pursuant to a protective order.

4. By letter dated November 23, 1988, the Bureau granted AT&T's FOIA request for the disclosure of Attachment B of MCI's Direct Case, and it denied the FOIA request with respect to the remaining documents. Initially, the Bureau determined that the three documents were encompassed within FOIA Exemption 4. Nevertheless, the Bureau believed that it should exercise its discretion and release Attachment B of MCI's Direct Case, without the constraints of a protective order, because that document would "clarify, and possibly resolve, key factual and legal issues."[4] In particular, the Bureau thought that this information would be relevant to whether MCI's offer to Holiday constitutes unreasonable discrimination and whether AT&T's Holiday Rate Plan could be justified on grounds of competitive necessity.

5. The Bureau, however, concluded that neither Attachment F of MCI's Direct Case nor US Sprint's filing was of critical significance to the issues in the proceeding. The Bureau recognized that the Commission had requested this information in order to provide a "factual context" for the consideration of broad policy issues concerning the impact of single customer offers. Nevertheless, the Bureau concluded that the remaining information was not crucial to the resolution of the issue of the lawfulness of AT&T's Tariff F.C.C. No. 15. The Bureau concluded that the limited value of the disclosure of this remaining information did not outweigh the potential for substantial competitive harm that would likely result from the information's release.

ISSUES

6. On December 5, 1988, AT&T filed a request for review of the Bureau's action denying access to Attachment F and US Sprint's filing. On review, AT&T requests only that the Commission place in the public record the number of offers contained in MCI's Attachment F and in US Sprint's submission. Disclosing this minimal information, AT&T contends, would provide interested parties with some idea concerning the extent to which single customer offers have become a standard practice in the interexchange market but would not impair the submitters' need for confidentiality.

7. In response to AT&T's suggestion that the number of offers be placed in the public record, MCI argues that even this limited information is competitively sensitive. MCI argues that this data, combined with other informa-

tion, would reveal information about the extent of MCI's marketing of customer-specific offerings. US Sprint argues that this more limited form of disclosure would reveal no information that would be useful in this proceeding.

DISCUSSION

8. The FOIA does not require agencies to generate documents.[5] Nevertheless, on occasion we have provided exempt information in summary form when its disclosure would assist us in resolving an important issue. In this instance, the information AT&T seeks would not have assisted either the Commission or the public in resolving the investigation. In our decision in the Tariff 15 proceeding, we determined, on the basis of MCI's statement in its rebuttal, that its Holiday offer is now generally available. The summary information sought by AT&T has no bearing on this issue and was not relied upon in our decision, nor were the underlying documents themselves. Moreover, to the extent AT&T seeks this information as background for the resolution of general policy issues, we agree with US Sprint that the information AT&T seeks would be of limited value for this purpose. Therefore, we find that AT&T has not provided us with sufficient reason to generate a new document containing the requested information.[6]

9. Accordingly, for the reasons set forth above, AT&T's Application for Review is DENIED. AT&T may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

10. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 5 U.S.C. § 552.

[2] *In the Matter of AT & T Communications Tariff F.C.C. No. 15, Competitive Pricing Plans-Holiday Rate Plan*, FCC 88-299, CC Docket No. 88-471, released September 20, 1988 *(Investigation Order)*.

[3] 5 U.S.C. § 552(b)(4); *see also* 47 C.F.R. § 0.457(d). Exemption 4 authorizes the Commission to protect from disclosure trade secrets and commercial or financial information that is obtained from a person and that is privileged or confidential. Generally, information is confidential "if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks & Conservation Ass'n. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

[4] Letter dated November 23, 1988 from Gerald Brock, Chief, Common Carrier Bureau, to Francine J. Berry, Esq., American Telephone & Telegraph Company at p. 4.

[5] *See, e.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 162 (1975); *Long v. IRS*, 825 F.2d 225, 229-30 (9th Cir. 1987) (agency not obligated to restructure records for release).

[6] Because the decision to generate this record is a matter entirely within our discretion, we need not resolve the parties' claims concerning whether this information would fall within an FOIA exemption. Nevertheless, the submitters' objection to disclosure is a factor that we have weighed in our decision not to release the data.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TMC COMMUNICATIONS, INC. File No. I-T-C-90-052-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to transfer control of international resale authorization.

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1990; Released: April 10, 1990

By the Chief, International Facilities Division:

I. INTRODUCTION

A. *Background*

1. On January 30, 1990, TMC Communications, Inc. (TMC) filed an application with the Commission seeking authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214, to transfer control of TMC and its Section 214 authorization to Omnicorp International B.V. (Omnicorp) through its subsidiaries and subsequently to Omnicorp's subsidiary Com Systems.[1] The application is unopposed.[2]

2. TMC and Com Systems are California corporations that operate as domestic and international resale carriers. TMC currently provides international switched voice resale services under a Section 214 authorization[3] issued pursuant to the streamlined regulatory requirements established for non-dominant international carriers in the *International Competitive Carrier* proceeding, 102 F.C.C. 2d 812 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986). Com Systems provides international switched voice resale services under two Section 214 authorizations.[4] Com Systems is controlled by Omnicorp, a corporation organized under the laws of the Netherlands,[5] through its wholly-owned subsidiary Omni Corp Holdings, Inc., a Delaware corporation. Com Systems is a foreign-owned carrier under the Commission's *International Competitive Carrier* policies, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points, *see supra* n.5. TMC and Com Systems also provide domestic services in accordance with the Commission's decisions in its domestic *Competitive Carrier* proceedings, which authorized non-dominant carriers to provide interstate services without specific Section 214 authority.[6]

B. *The Purchase Agreement*

3. The proposed transaction initially contemplates the acquisition by OmniCorp Holdings, Inc., through its wholly-owned subsidiary Omnicom Acquisition Corporation, of 100 percent of TMC's stock. Omnicom will merge into TMC and TMC will survive the merger as a wholly-owned subsidiary of Omni Corp Holdings, Inc.[7] Subsequently, Omnicorp, Com Systems and TMC intend to transfer 100 percent of TMC's stock from OmniCorp Holdings, Inc. to Com Systems.[8] After completion of these transactions the parties anticipate that TMC and Com Systems will operate under a unified management team consisting of a combination of TMC and Com Systems officers, and Com Systems will provide international switched voice resale services to TMC's customers. This service will be provided under the same rates, terms and conditions as set forth in TMC's currently filed Tariff F.C.C. No. 1. Com Systems plans to adopt TMC's international message telecommunications tariff pursuant to Section 61.171 of the Commission's Rules, 47 C.F.R. §61.171 (1989).

II. DISCUSSION

4. In a related decision released February 5, 1990, we granted the application of Com Systems and Omnicorp, *see supra* n.5, for transfer of control of Com Systems to Omnicorp. In that decision, we found that the proposed stock transaction could provide Com Systems with finding essential to maintain a healthy financial condition, avoid service disruption to existing customers, and expand its services and customer base. We find the same public interest considerations to be applicable to the instant TMC application. TMC states that grant of its application will permit TMC and Com Systems to obtain critical financial support from Omnicorp and to realize efficiencies that will enable them to continue providing high quality customer service. Accordingly, we find that grant of the instant application will serve the public interest by promoting competition in the international switched voice market.[9]

5. In addition to our regulatory review under the Communications Act, we are charged with the responsibility of reviewing the proposed transaction in light of the provisions of Section 7 of the Clayton Act. Section 7 proscribes the acquisition of stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[10] Under Section 11 of the statute, the Commission is empowered to enforce Section 7 in the case of "common carriers engaged in wire or radio communications or radio transmissions of energy."[11] The courts have construed this to mean that the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[12] In brief, we are required to consider anti-competitive consequences as one factor in our public interest consideration. As noted above, the proposed transaction will allow an existing competitor in the international services market to remain financially healthy. It will not lessen competition or increase concentration. Thus, our Clayton Act

review does not indicate that the proposed transaction will in any way substantially lessen competition or tend to create a monopoly in any line of commerce.

6. In view of the foregoing, we find that the public convenience and necessity will be served by approving the instant application.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the application of TMC and Omnicorp, File No. I-T-C-90-052-TC, for transfer of control of TMC to Omnicorp, through its subsidiary OmniCorp Holdings, Inc., and then subsequently to Com Systems IS GRANTED.

8. IT IS FURTHER ORDERED that this grant is subject to the condition that TMC will be classified as dominant in the provision of international switched voice resale services absent an express determination by the Commission that TMC is non-dominant.

9. IT IS FURTHER ORDERED that the grant is subject to the condition the TMC shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services within 90 days from the end of each calendar quarter and that TMC shall file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that TMC shall file copies of any operating agreement entered into by itself or its parent/affiliate within 30 days of its execution.

11. IT IS FURTHER ORDERED that TMC shall file annual traffic and revenue reports as provided in 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

12. IT IS FURTHER ORDERED that TMC shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for international services originating or terminating in the United States.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] On January 30, 1990 we granted TMC's Special Temporary Authority (TAO-1583) to allow consummation of the proposed transfer of control, without prejudice to the Commission's ultimate decision in the instant proceeding.

[2] TMC's associated domestic applications also were unopposed. On November 10, 1989, the Common Carrier Bureau granted TMC's application to assign its nineteen point-to-point microwave station licenses to Licensee, Limited Partnership (File No. 10828-CF-AL-(19)-89). *See Public Notice*, November 15, 1989. On March 14, 1990, the Domestic Facilities Division granted a request for declaratory ruling, finding that TMC's twenty-five percent limited partnership interest in Licensee, Limited Partnership did not implicate Section 310(b) of the Communications Act. *See Licensee, Limited Partnership*, DA 90-405 (Dom. Fac. Div., March 14, 1990).

[3] Marsch Communications Management, Inc., 3 FCC Rcd 821, *erratum*, 3 FCC Rcd 1685 (Int. Fac. Div. 1988).

[4] Com Systems, Inc. 2 FCC Rcd 582 (Int. Fac. Div. 1987); International Telecharge, Inc. *et. al*, 2 FCC Rcd 1782 (Int. Fac. Div. 1987).

[5] Omnicorp is an investment firm primarily engaged in noncommunications-related business activities. Application at 11. Omnicorp is, in turn, a wholly-owned subsidiary of Omni Holding AG, a publicly held, multi-national corporation organized under the laws of Switzerland. The largest single shareholder of Omni Holding AG is Mr. Werner K. Rey, a citizen of Switzerland, who owns approximately 80 percent of its shares. Com Systems, Inc., 5 FCC Rcd 696 (Int. Fac. Div. 1990).

[6] *See* Competitive Carrier, 91 F.C.C. 2d 59 (1982).

[7] On completion of the merger, each share of Omnicom common stock will be converted into one share of TMC common stock and each share of TMC common stock will be converted into the right to receive $12.50 in cash, less certain adjustments.

[8] Accordingly, the parties acknowledge that, once control of TMC is transferred to Omnicorp or Com Systems, TMC's provision of international common carrier service will be subject to dominant carrier regulation to the same extent that Com Systems' international service is subject to dominant carrier regulation.

[9] In authorizations of new entrants over the past decade the Commission has recognized that increased competition in international markets is beneficial. *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, Mimeo No. 3548 (released April 4, 1986) at n.2.

[10] 15 U.S.C. Section 18.

[11] 15 U.S.C. Section 21.

[12] United States v. F.C.C., 652 F.2d 77, 88 (D.C. Cir. 1980).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies
Tariff F.C.C. No. 2

Transmittal No. 406

ORDER

Adopted: April 3, 1990; **Released: April 3, 1990**

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On January 4, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 406, which would establish a "diverse route" at an individual case basis (ICB) rate for special access and exchange services between the premises of its customer, ITT Automotive (ITTA), and a Michigan Bell central office in the state of Michigan.[1] Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or suspend and investigate Transmittal 406, to which Ameritech replied. Ameritech Transmittal 406 is scheduled to become effective April 4, 1990. For the reasons discussed below, we reject Ameritech Transmittal 406.

II. SUMMARY OF PLEADINGS

2. MFS asserts that Ameritech does not adequately describe the facilities it will employ or the services it will offer in Transmittal 406, as required by Section 203(a) of the Communications Act, 47 U.S.C. § 203(a). MFS Petition at 2. Absent futher clarification, MFS contends, it is impossible to determine whether Ameritech is in compliance with the Commission's *ICB Order*.[2] MFS maintains that Ameritech's cost support is deficient under Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, because it does not provide disaggregated figures for costs and investments which are necessary to evaluate the reasonableness of the proposed rates. *Id.* at 3.

3. Ameritech states that it currently offers DS1 and DDS service at tariffed rates to ITTA, the customer which requested the diversity routing service. Ameritech Reply at 2. Ameritech contends that Michigan Bell, its subsidiary, will connect ITTA's premises with fiber pair to Michigan Bell's serving wire center. Ameritech asserts that this diverse route is merely a stand-by facility which will be activated only in the event that ITTA's primary facilities are rendered inoperable or experience service degradation. *Id.*

4. Ameritech claims that Section 11 of its access tariff provides for the filing of "unique rates" for the provision of diverse routing. According to Ameritech, ITTA pays a general tariffed rate for its primary service, but will pay for the separate diverse route on an ICB basis. *Id.* Ameritech maintains that Michigan Bell will recover only the incremental costs associated with the provision of diverse routing service. Ameritech alleges that the demand for diverse routing is limited and that only nine customers in the Ameritech service area currently receive diverse routing service. *Id.* Ameritech concludes that the limited nature of the offering, combined with the service's costs which vary from customer to customer, make the use of ICB pricing for the service appropriate. *Id* at 4. Finally, Ameritech implies that the Commission's *ICB Order* is not applicable to Transmittal 406 because the services underlying the diverse routing service are provided on a general tariffed basis and involve no DS3 services. *Id.*

III. DISCUSSION

5. Pursuant to Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), carriers must meet a substantial burden in attempting to demonstrate any justification for individualized rates. [3] The carrier must demonstrate that the service it seeks to tariff at ICB rates differs sufficiently from the services the carrier generally provides to justify this extraordinary ratemaking approach. As the Commission noted in its *ICB Order*:

> Although the [Communications] Act does not expressly require general offerings, the Act does require the carriers to establish charges that do not result in "unreasonable" discrimination among customers of "like" telecommunications services. This obligation is normally interpreted as requiring that carrier offerings be generally available to all similarly situated customers. *See Sea - Land Services, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C.Cir. 1984); *AT & T Communications*, 4 FCC Rcd 4932, 4938 (1989) (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989). It might theoretically be possible to devise a scheme for developing individual rates for each facility that does not produce discrimination, but it would be extremely difficult to establish a scheme that would produce individual facility rates that are rationally related to each other in some manner that is fair, just, and reasonable.

ICB Order, 4 FCC Rcd at 8642 (cited in New England Telephone and Telegraph, Tariff F.C.C. No. 40, Transmittal No. 1030, DA 90-516 at para. 7 (released Mar. 16, 1990) (*NET Order*)).

6. Consistent with our finding in the *NET Order*, Ameritech must demonstrate that ICB pricing of its diverse routing service is necessary and appropriate. We conclude that Ameritech has not adequately justified these rates. Like NET, Ameritech has not shown that the costs of provisioning diverse routing service are not susceptible to averaging, or that the provisioning of diverse routing service differs in any material respect from the provisioning of the service carried over the primary route. In this context, diverse routing service is not a new or unique service. Moreover, Ameritech has not shown that, to the extent there are any differences between diverse routing service and other services that Ameritech provides, such differences render averaged ratemaking impracticable or provide any justification for the use of ICB rates. The material supporting Ameritech's filing does not address any of these issues.

7. We also find unpersuasive Ameritech's statement that "[t]he clearly limited nature of the offering, as well as the fact that the costs to provide the diversely routed service will vary, make the use of a unique [ICB] rate appropriate." Ameritech Reply at 4. As we noted with respect to NET, there appears to be no material difference between the type of facilities provided for diverse routing service vis-a-vis the type of facilities Ameritech is in the business of providing on a general basis as a common carrier. Moreover, as the Commission noted in the *ICB Order*, cost differences can be shown to exist between particular customers for any service. Furthermore, any difference in the cost of providing service to individual customers is not sufficient to justify ICB rates. *See ICB Order*, 4 FCC Rcd at 8644.

8. For the foregoing reasons, we conclude that Ameritech has not demonstrated that ICB pricing for diverse routes is warranted. Accordingly, we conclude that Ameritech's ICB pricing of diverse routing service is unreasonably discriminatory in contravention of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), for the reasons stated in the Commission's *ICB Order*. We therefore reject the captioned transmittal as patently unlawful.

IV. ORDERING CLAUSES

9. For the reasons stated above, we conclude that the tariff revisions in Transmittal No. 406 are patently unlawful because those provisions violate established Commission precedent and Section 202(a) of the Communications Act, 47 U.S.C. § 202(a).

10. Accordingly, IT IS ORDERED that pursuant to Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), the individual case basis rates for diverse routing service in Ameritech Operating Companies, Tariff F.C.C. No. 2, Transmittal No. 406, ARE REJECTED.

11. IT IS FURTHER ORDERED that the petition to reject, suspend, or investigate Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 406, filed by Metropolitan Fiber Systems, Inc., IS GRANTED to the extent provided herein.

12. IT IS FURTHER ORDERED that Ameritech Operating Companies SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material. These revisions shall be scheduled to become effective on not less than one day's notice.

13. IT IS FURTHER ORDERED that Special Permission No. 90-328 is assigned and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] According to Ameritech, a diverse route provides an alternative transmission path in the event of service interruption on the primary channel.

[2] MFS Petition at 2 (citing Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*ICB Order), recon. pending).*

[3] *See generally ICB Order*, 4 FCC Rcd at 4682.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 85-301

In the Matter of

Amendment of Parts 15 and 76
Relating to Terminal Devices
Connected to Cable Television
Systems

ORDER

Adopted: March 23, 1990; Released: April 11, 1990

By the Commission:

1. By this action the Commission dismisses a petition filed on December 21, 1988, by Scientific Atlanta, Inc. (SAI) requesting partial reconsideration of the Commission's decision in the *Memorandum Opinion and Order (MO & O)* in this proceeding.[1] SAI requests a further increase of the output signal limits for cable system terminal devices (CSTDs). As discussed below, the Commission finds that neither SAI nor the commenting parties present any new information or analysis that would justify a further change in these standards.

2. In the *Report and Order (R & O)* in this proceeding, the Commission placed all CSTDs under the regulations for TV interface devices in Part 15 of the rules.[2] As part of that action, CSTDs became subject to the same output signal limits as are applicable to TV interface devices. The Commission stated it found no reason to distinguish between CSTDs and other types of TV interface devices with respect to output limits.[3] Furthermore, the Commission noted that signal levels at the RF output terminals of CSTDs may be strong enough to interfere with the reception of over-the-air TV signals by a television receiver operating on television channels adjacent to the output channel of the device.[4] Therefore, the Commission found it prudent to limit the output signal levels of CSTDs.

3. Several petitions for reconsideration of the *Report and Order* asked the Commission, among other things, to reverse this aspect of its decision and to refrain from imposing any limitation on the output signal levels of CSTDs. The petitioners stated that compliance with the output signal levels adopted in the *R & O* would be difficult to achieve without redesigning their equipment, especially in the case of heterodyne CSTDs. Some petitioners estimated that the additional circuitry required to bring heterodyne units into compliance with the output signal level limit would increase the retail price of such units by 12% to 40%, and that 75% of all CSTDs manufactured are of the heterodyne type.[5] As an alternative to eliminating the output signal limit for CSTDs, some parties recommended that the limits be increased.

4. In the *MO & O* responding to those petitions, the Commission acknowledged that the petitioners made a convincing argument for raising the maximum permitted output signal levels for CSTDs.[6] It therefore increased the maximum permissible output signal level for CSTDs from +9.5 dBmV to +15.5 dBmV for devices with an output impedance of 75-ohms and from +15.5 dBmV to +21.5 dBmV for devices with an output impedance of 300-ohms. In adopting these new output signal limits the Commission noted that in a parallel proceeding, GEN Docket No. 87-107, it established the isolation standard for cable input selector switches (commonly known as A/B switches) on the basis that typical maximum output signal levels of CSTDs were approximately +15.5 dBmV for units with 75-ohm output impedances and +21.5 dBmV for units with a 300-ohm output impedance.[7] Based on these typical output levels for CSTDs, the Commission specified the isolation requirements for a switch used in conjunction with cable television reception to be 80 dB from 54 to 216 MHz inclusive, and 60 dB from 216 to 550 MHz. The Commission indicated that matching the signal output limits for CSTDs with the typical maximum output levels expected from CSTD operation submitted as evidence in GEN Docket 87-107 was appropriate. It indicated that this increase in CSTD output levels would provide greater design flexibility without increasing the potential for harmful interference.[8]

5. In its current petition, SAI contends that the output signal levels adopted in the *MO & O* are still too restrictive and could be increased to permit a CSTD output signal level of +24 dBmV for devices with a 75-ohm output impedance and +30 dBmV for devices with a 300-ohm output impedance, an increase of 8.5 dBmV. SAI contends that channels 2, 3 and 4 are at the low end of the frequency range specified for A/B switch isolation and at these frequencies the A/B switch can be expected to exceed the specified 80 dB minimum isolation requirement. Further, SAI asserts that the Commission may have overlooked the fact that the output channel for a CSTD is generally a channel that is not in use in that community by over-the-air broadcasters. Additionally, SAI states that the new output signal limits will impose an excessive cost burden on low-priced CSTDs.

6. Eight parties representing the interests of cable equipment manufacturers and cable operators filed comments in support of the SAI petition.[9] The commenting parties endorsed SAI's position and did not submit any additional information.

7. We are not persuaded to revise the output signal limits for CSTDs established in the *MO & O*. The data submitted by SAI for the attenuation characteristics of A/B switches is for two selected individual switches and can not be considered generally representative of the performance characteristics of A/B switches. Thus, this data is not acceptable as a new performance measure to replace the Commission's A/B switch requirements as the benchmark for the output signal limits applicable to CSTDs. The A/B switch standard developed in GEN Docket No. 87-107 was deemed the minimum amount of isolation necessary to ensure adequate interference protection. In the *MO & O* in that proceeding, the Commission stated that manufacturers need not exceed the 80 dB limit for frequencies at or below 216 MHz adopted for the A/B switch.[10] Hence, we have no assurance that switches will be designed to consistently offer greater isolation at the lower frequencies than that specified in the rules. Further, we are aware that the output signals of heterodyne CSTDs are not confined to a single television channel of operation but may overlap into the adjacent channels. As dis-

cussed above, the Commission recognized in the *R & O* that signal levels at the RF output terminals of CSTDs, unless controlled, may be strong enough to interfere with the reception of over-the-air TV signals by a television receiver operating on television channels adjacent to the output channel of the CSTD.[11] In addition, the Commission considered the economic impact of requiring CSTDs to incorporate output signal limiting capability and weighed this against the interference potential of these devices before adopting the output limits in the *MO & O*.[12] Moreover, SAI has not demonstrated that the additional cost to the industry that our requirements may impose will be significant enough to warrant risking the additional interference that may arise if we relaxed the output signal level. Accordingly, we find no basis for revising our decision.

8. Pursuant to the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, and Section 1.106 of the Commission's rules, IT IS ORDERED the petition for reconsideration filed by Scientific Atlanta, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Memorandum Opinion and Order* in GEN Docket No. 85-301, FCC Rcd 6491 (1988).

[2] *See Report and Order* in GEN Docket No. 85-301, 2 FCC Rcd 3304 (1987). Prior to this action the rules provided that CSTDs owned or supplied by a cable system operator were subject to the provisions of Part 76 of the rules, while CSTDs owned by subscribers were regulated by Part 15 of the rules. These differences in regulatory treatment existed even though the equipment owned by the cable subscribers and the cable operators was in many cases identical. TV interface devices are now regulated under Part 15 Section 15.115 (47 CFR Section 15.115). *See First Report and Order* in GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989).

[3] *See Report and Order* in GEN Docket No. 85-301, *supra* at para. 27.

[4] *Id.*, at para. 7.

[5] *See Memorandum Opinion* and *Order* in GEN Docket No. 85-301, *supra*, at para. 10.

[6] *Id., at para. 15.*

[7] *See Report and Order* in GEN Docket No. 87-107, 2 FCC Rcd 7231 (1987), at para. 12.

[8] *See Memorandum Opinion and Order* in GEN Docket No. 85-301, *supra*, at para. 16.

[9] These parties are Continental Cablevision, Inc.; Cox Cable Communications; Heritage Communications, Inc; Oak Communications Inc.; Adelphia Communications Corporation; Armstrong Utilities, Inc; Selkirk Communications Inc.; and the National Cable Television Association, Inc.

[10] *See Memorandum Opinion and Order* in GEN Docket No. 87-107, 3 FCC Rcd 4222 (1988), at para. 16.

[11] *See Report and Order* in GEN Docket No. 85-301, *supra*, at para. 7.

[12] *See Memorandum Opinion and Order* in GEN Docket No. 85-301, *supra*, at para. 31.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 6, 1990

RELEASE OF UNITED STATES CONTRIBUTION ON ARTICLE XIV(d) OF THE INTELSAT AGREEMENT

On December 8, 1989 the Federal Communications Commission released a Public Notice, DA 89-1565, requesting comments regarding INTELSAT's review of the significant economic provisions in Article XIV(d) of the INTELSAT Agreement. Comments and replies were filed in January, 1990 and placed in the public file in Room 533, 1919 M Street, N.W., Washington, D.C. 20554.

The comments and replies were reviewed and a United States contribution was prepared and submitted to the Eighty-fourth Meeting of the INTELSAT Board of Governors. A copy of this document is being placed in the above public file.

For additional information, contact Joel Pearlman at (202) 632-3214.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth's Petition for Declaratory Ruling That Its Refusal to Assign "NXX Codes" Under Particular Circumstances Will Not Violate the Communications Act

File No. ENF-90-6

ORDER

Adopted: April 2, 1990; Released: April 3, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On February 1, 1990, BellSouth Corporation filed a petition for declaratory ruling that its refusal to assign NXX codes to Telecom* USA was not a violation of the Communications Act. A public notice was issued on March 8, 1990, requesting comments from the public by April 9, 1990, on BellSouth's petition.[1]

2. Subsequently, on March 28, 1990, Telecom* USA notified BellSouth by letter that it was unconditionally withdrawing its pending request for NXX codes. Thus the particular facts and circumstances giving rise to BellSouth's petition are no longer applicable and the controversy between the parties has been rendered moot. Therefore, on March 28, 1990, BellSouth filed a motion to withdraw its petition.

3. We are satisfied that grant of BellSouth's motion will serve the public interest by eliminating the expenditure of further time and resources in view of the fact that no controversy or uncertainty continues to exist.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the Motion to Withdraw filed in this matter by BellSouth IS GRANTED.

5. IT IS FURTHER ORDERED that the invitation to file comments with respect to the petition IS CANCELLED.

6. IT IS FURTHER ORDERED that the above-captioned petition IS DISMISSED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] DA 90-325.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
RADIO MABLETON LIMITED	File No. BPH-870710MT
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
HAIRSTON BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870710NO
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a New
FM Station on Channel 273A
(102.5 MHZ), Mableton, Georgia

APPEARANCES

Joseph Belisle on behalf of Mableton Broadcasting Company, Inc.; *Dennis Begley*, *Matthew H. McCormick* and *Troy F. Tanner* on behalf of Gonzales Broadcasting, Inc.; *Stephen Yelverton* on behalf of Bolton Broadcasting Limited; *William Bernton* on behalf of Voth Broadcasting Company; *J. Dominic Monahan* and *Peter Doyle* on behalf of Radio Mableton Limited; *Thomas A. Hart, Jr.*, on behalf of Metropolitan Management Corporation; *Lawrence J. Bernard* on behalf of Lorenzo Jelks; *James Winston*, *Walter Diercks* and *Desmond P. Brown* on behalf of QRW Partners Limited Partnership; *Grier C. Raclin*, *James K. Edmundson*, and *Kevin S. DiLallo* on behalf of Hairston Broadcasting Limited Partnership; *James J. Freeman*, *Mary V. Huff* and *Joel Laiks* on behalf of Mableton Communications Ltd.; and *Norman Goldstein* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: April 3, 1990; Released: April 11, 1990

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INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

INTRODUCTION

1. Ten applicants out of eighteen remain in this comparative contest for Channel 273A (102.5 MHz), Mableton, Georgia; (1) Mableton Broadcasting, Inc. (MBC); (2) Gonzales Broadcasting, Inc. (Gonzales, GBI or GBC); (3) Bolton Broadcasting, Limited (Bolton or BBL); (4) Voth Broadcasting Company (Voth); (5) Radio Mableton, Limited (RML); (6) Metropolitan Management Corporation (Metropolitan or MMC); (7) Lorenzo Jelks (Jelks); (8) QRW Partners Limited Partnership; (9) Hairston Broadcasting Limited Partnership (Hairston or HBLP); and (10) Mableton Communications Limited (MCL).

2. After the interlocutory cycle had run its course, and the faltering applications had been dismissed, evidence was taken on the following nine factual issues and the ultimate conclusionary issue:

Jelks-1:	To determine whether Lorenzo Jelks is financially qualified to be a Commission licensee:
Jelks-2:	To determine whether Lorenzo Jelks misrepresented the facts to the Commission on July 10, 1987, when he represented that he would " . . . file an amendment relating to his financial qualifications in the near future," and if so, what effect that has on Jelks' qualifications to be a Commission licensee;"
Hairston-1:	To determine whether Hairston Broadcasting Limited Partnership is financially qualified;
Hairston-2:	To determine whether on August 31, 1987 Hairston Broadcasting Limited Partnership falsely certified its financial qualifications;
Hairston-3:	To determine whether on September 1, 1987, Hairston's purported lender, Atlantic Coast Equities, had sufficient net liquid assets to fund the proposed loan to Hairston Broadcasting Limited Partnership;
Hairston-4:	If a final environmental impact statement is issued with respect to Hairston in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 CFR Sections 1.1301-1319;
MCL-1:	To determine whether MCL has reasonable assurance that their proposed transmitter/tower site is available, and if not, whether MCL is qualified to be a Commission licensee;

MCL-2:	To determine whether MCL has misrepresented the facts or lacked candor with the Commission about the availability of their proposed transmitter/tower site;
Comparative:	To determine which of the proposals would, on a comparative basis, best serve the public interest; and
Ultimate Issue:	To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

3. There are two other matters that must be considered under the standard comparative issue. First, the Chief, Audio Services Division has called for comparative coverage evidence. *See* 53 F.R. 35903 published September 15, 1988 at paragraph 14. Secondly, the Commission wants certain environment factors; namely, Hairston's and Voth's[1] radio frequency (RF) radiation violations considered under the standard comparative issue. *See* Environmental Rules, 60 RR 2d 13 (1986) at paragraphs 8 and 20; FCC 88M-3587, released October 26, 1988; and FCC 88M-4189 released December 7, 1988.

4. We held the Prehearing Conference on December 13, 1988, and the Evidentiary Admission Session on January 24, 1989. The Phase I and II hearings were held on February 21, 22, 23, 24, 27 and 28, 1989, and on March 1, 2, 3, 6, 7, 8, 9, 10 and 13, 1989. The Phase III hearings were held on June 1 and 2, 1989. We first closed the record on June 2, 1989 (FCC 89M-1636, released June 9, 1989).

5. The ten applicants along with the Mass Media Bureau filed Proposed Findings of Fact and Conclusions of Law on August 4, 1989.[2] All of the applicants except for Voth, RML, and Jelks, filed Reply Findings.

PRELIMINARY RULING

6. Before proceeding to the findings of fact, a preliminary ruling is in order: Voth Broadcasting Company's application (BPH-870710MF) IS DISMISSED for failure to prosecute. Voth has done absolutely nothing to aid us in our search for the truth. At the outset Voth proffered a late-filed integration statement that failed to comply with the Prehearing Order. In fact it was so devoid of any of the requisite data that Voth's opponents couldn't adequately engage in pre-trial discovery or pre-trial preparation. So that late-filed Integration Statement was rejected, and Voth was credited with 0% integration. *See* FCC 88M-3523 released October 21, 1988.

7. Next, Voth wasn't prepared to exchange his direct case exhibits at the prehearing conference. *See* Tr. 32-34. When Voth finally exchange their exhibits, they were both fragmentary and incomplete. For example, Voth never supplied the dates-of-birth of any proposed integrated principals, although they were expressly directed to do so (Tr. 64, 154), and never did, and still haven't given us a specific integration proposal - even as an offer of proof.

8. Next, aside from the December 13, 1988 prehearing and the January 24, 1989 evidentiary admission session, Voth did not attend any of the many hearing sessions that were held in this case. *See* paragraph 4 *supra*. So it couldn't and didn't offer any assistance to the resolution of the many issues we faced.

9. Finally Voth was expressly directed to file proposed findings of fact on all outstanding issues. *See* Tr. 5986-5987; Tr. 6480-6481. They not only did not do so, they didn't even try to do so. Thus, they have failed to prosecute their application, dismissal for failure to prosecute is warranted, and Voth will not be considered further. So for all practical purposes we will proceed with nine applicants.[3]

FINDINGS OF FACT

JELKS - 1: FINANCIAL QUALIFICATIONS

10. Under Issue Jelks-1, we must determine whether Lorenzo Jelks is financially qualified to be a Commission licensee. When Jelks was preparing his application (BPH-870710MZ) he was asked whether he had sufficient net liquid assets on hand or available from committed sources to construct and operate his requested facility for three months without revenue. He answered "no." But then he added this statement: "Applicant will file an amendment relating to his financial qualifications in the near future." That's what he said he was going to do. But he never did. And according to Presiding Officer's records, he still hasn't.

11. During the hearing Jelks tried to introduce an exhibit (Jelks Exhibit 5) entitled "Financial Qualifications of Lorenzo Jelks." That proffer was rejected because it varied from his application (Tr. 4110-4122).

12. At the hearing it also developed that Jelks didn't prepare a budget before completing his application; and he never computed the number of people he'd have on his staff. In fact, his application and his rejected financial exhibit even conflict about the number of people he proposes to hire. Jelks didn't submit a Model EEO Program with his application because he proposed employing less than five people. But at the hearing he proposed employing five people. Jelks still hasn't submitted a Model EEO Program (Tr. 4147-4150).

13. *Jelks - 1: Intermediate Findings*. Findings 10-12 make it abundantly clear that Lorenzo Jelks is not now and never has been financially qualified. His application still shows that he does not have sufficient net liquid assets on hand or available from committed sources to construct and operate his requested facility for three months without revenue.

JELKS - 2: FINANCIAL MISREPRESENTATION ISSUE

14. As previously noted (Finding 10 *supra*.) on July 10, 1987, when he filed his application, Lorenzo Jelks represented to the Commission that he would " . . . file an amendment relating to his financial qualifications in the near future." Over a year later (on September 8, 1988) Jelks still hadn't filed that financial amendment. And as previously noted (Findings 12 *supra*.), he still hasn't.

15. In any event, on November 16, 1988, the Presiding Officer called on Jelks to explain why he never lived up to his July 10, 1987 representation. *See* FCC 88M-3900. At the hearing Jelks was unable to adequately explain

why he didn't amend his application as he represented he would. The record shows that it wasn't until late 1987 about five months after he filed his application that Jelks received an acceptable loan commitment letter from his communications counsel (Jelks Ex. 6, p. 2; Tr. 4167). But he made no *concerted* effort to secure a loan letter that would pass Commission muster until the summer of 1988 (Tr. 4157-4158, 4171), and he didn't try to enlist his counsel's help in obtaining an adequate bank letter until the late fall of 1988 - well after Gonzales has filed its Petition to Enlarge Issues against him (Tr. 4191-4194). Jelks was well aware all along of the representation he had made in BPH-870710MZ; i.e., that he would file a financial amendment " . . . in the near future."

16. *Jelks - 2: Intermediate Findings*: Based on the record evidence, it's apparent that Lorenzo Jelks never tried to live up to his July 10, 1987 representation that he would " . . . file an amendment relating to his financial qualifications in the near future." He was aware that he'd made that representation. But he never really made a serious effort to fulfill it or carry it out until some 15 months later. And, as previously noted (Finding 10 *supra*.) he never has so amended his financial certification. Thus, Lorenzo Jelks hasn't prosecuted his application in a manner that befits a prospective broadcast permittee. So even *assuming* that he was financially qualified (but see Findings 10-13 *supra*.), his application would still be denied. He simply lacks the necessary character qualifications.

HAIRSTON - 1: FINANCIAL QUALIFICATIONS

17. Under Hairston-1 we must find out if Hairston is financially qualified to successfully prosecute their Mableton application, construct the station, and operate it for three months without revenue. This issue, unlike Hairston-2 and 3, looks forward. Stated another way, in resolving Hairston Issue 2 and 3 we must analyze the documents available to Hairston on August 31 and September 1, 1987, when they certified they were financially qualified. Under Hairston-1, we can evaluate financial data developed after that date.

18. Hairston estimates it will cost $317,300 to prosecute their application, and construct and operate their proposed station for three months without revenue. That total is broken down as follows: (a) projected costs to continue prosecution - $72,500; (b) costs of equipment and construction - $72,500; (c) costs of operating the station for three months without revenue - $73,300; and (d) accrued FCC engineering and legal fees - $99,000.

19. Hairston intends to meet that $317,300 financial commitment through (a) bank loans in the aggregate of $250,000; (b) Robin and Carl Hairston's assets;[4] and (c) settlement proceeds that the 49% limited partner, United Communications, Inc., will receive from other FCC proceedings. More specifically, Robin Hairston and United have agreed to meet the $99,000 in accrued FCC, enginering and legal fees and the record shows they are financially able to do so. United has $85,000 coming from two FCC settlement. The Hairstons have real estate with a net value of $295,400; cash of $25,000, Carl Hairston's $150,000 vested severance pay, against which they can borrow, and his 1989 salary with the Cleveland Browns which will exceed $400,000. So there is no question that Hairston's general and limited partners can more than meet the $99,000 in accrued FCC, engineering and legal fees.

20. This then leaves the bank loans of $250,000 to meet the remaining $218,300 (see Finding 18 *supra*.) financial obligation. Thus Hairston has a $31,700 cushion.

21. Hairston's opponents, of course, challenge their financial qualifications. They raise the shop-worn argument that the bank loan commitments in the aggregate of $250,000 are mere accommodations. That challenge is rejected. The two bank letters are in a form the Commission has accepted in the past (Tr. 6002).

22. *Hairston - 1: Intermediate Findings*. Hairston Broadcasting Limited Partnership has successfully demonstrated that it has the financial wherewithal to prosecute their Mableton application, construct their proposed station, and operate it for three months without revenue. So Hairston is financially qualified, and Hairston-1 poses no bar to a grant of their application.

HAIRSTON ISSUES 2 - 3 [5]

23. Under the Hairston Issue 2 we must determine whether Robin Hairston falsely certified to the applicant's financial qualifications in the amendment that Hairston filed on August 31, 1987; and under Hairston Issue 3 we must determine whether at that time, Hairston's purported lender Atlantic Coast Equities, had sufficient net liquid assets to fund the proposed loan to the partnership. Unlike the financial issue (Hairston-1 *supra*.) here we must evaluate the financial documents that purportedly existed when Robin Hairston affirmatively certified that the partnership had sufficient net liquid assets on hand or available from committed sources to construct the station and operate it for three months without revenue.

24. Hairston filed their application on July 10, 1987. There Robin Hairston abstained from certifying their financial qualifications. Instead, after conferring with counsel, she placed an asterisk next to the question and noted "financial arrangements being finalized." (Gonzales Phase III, Ex. 1, pp. 1, 4-5; Tr. 6386-6387).

25. Later, *on August 29, 1987*, Mrs. Hairston executed a financial amendment. There she represented that Hairston was now financially qualified. There, and despite later and evasive testimony to the contrary (see *infra*.) she based that certification on a letter that was not yet in existence, i.e., a letter, *dated September 1, 1987*, from Atlantic Coast Equities.[6]

26. She was then asked what "financial arrangements" were "being finalized" between July 10, 1987, and August 29, 1987. *See* Findings 24 *supra* She said it was the Atlantic Coast commitment letter that hadn't been completed on or before July 10, 1987, when Hairston applied (Tr. 6387-6388). Atlantic Coast Equities, as it turns out, was a sole proprietorship operated by her friend, and sometimes financial adviser, Philip Wainwright (Tr. 6046).

27. At this point, Mrs. Hairston's Phase III testimony not only became inconsistent, she began contradicting herself. She was asked if Atlantic Coast had committed to make funds available. She answered: "yes, they had committed, I was informed they had talked to some lending institutions and they didn't see there was going to be a problem; but at the time the application was filed, I didn't

have it in writing,[7] so that is why 'no' was marked on my application, and a note was made that financial arrangements were being finalized."

28. That response directly contradicts both her earlier deposition testimony and other hearing testimony. At her earlier deposition testimony (on April 13, 1989) she swore there had been no discussion of any other entity providing funding except Atlantic Coast (Tr. 6391). And in her initial deposition she said, "I assumed or felt they [Atlantic Coast] would be the ones I would be dealing with directly. Now if they got the funds from other sources, I don't know anything about that." (Tr. 6431).

29. Throughout her testimony, Robin Hairston appeared bent on complicating the financial certification question.[8] First, and repeatedly, she stated that she wasn't relying on the Atlantic Coast letter (Tr. 6396- 6397). But almost simultaneously (Tr. 6397-6398) and in response to her own counsel, she said she was relying on the Atlantic Coast letter. She then swore that Philip Wainwright had told her he " . . . could *arrange* for Atlantic Coast Equities to lend me the money" (Tr. 6433). But she then said that her arrangement with Atlantic would be a "straight up loan transaction" (Tr. 6464).[9]

30. Philip Wainwright's testimony lends no support to Robin Hairston's contention that she had a right to rely on Wainwright's September 1, 1987 letter on the Atlantic Coast Equities' letterhead. Wainwright never intended that Atlantic Coast would be the source of Hairston's funds. In fact, in his September 1, 1987, letter he was "very careful" not to use language that would indicate that Atlantic Coast would lend Hairston the money (Tr. 6106). He says he never told Robin Hairston that Atlantic Coast would be the source of funds. Indeed he believes that both he and Mrs. Hairston both knew that they had entered into a deal where he would "arrange" a loan to be made directly to them from another source,[10] and in return he would receive a fee (Tr. 6102, 6114-6117, 6121-6123, and Gonzales Phase III, Exhibit 8, page 20).[11] This means that the September 1, 1987 loan commitment letter that Robin Hairston ostensibly relied on, on August 29, 1987, was not a loan commitment letter at all.

31. Wainwright proffered some testimony about loan steps he had taken ostensibly on Robin Hairston's behalf (see Footnote 10 *supra*.). But he never provided Mrs. Hairston with any progress reports about his efforts to obtain a loan for her (Tr. 6433); he never drew up any formal financial statement for the Hairston (Hairston Phase III, Exhibit 3); and he never kept any notes or records on his efforts to obtain them a loan. In fact, the only testimony Wainwright could give on the subject was about some undocumented, uncorroborated verbal contacts he made with some potential money lenders (Tr. 6076, 6096, 6107-6108).

32. For her part, Mrs. Hairston never tried to formulate any basis for her August 29, 1987 financial certification. She never asked Wainwright where the funds might come from (Tr. 6399); she never asked for any documents on Atlantic Coast's financial condition (Tr. 6458); she never discussed what Atlantic Coast would require to obtain the loan commitment (Tr. 6444-6445); and she never provided any substantive information to Wainwright about the proposed Mableton station. Nor after the initial partnership get-acquainted meeting in late June or early July 1987 did she ever furnish any information about her personal financial condition (Tr. 6437-6438).

33. Even *assuming* that Philip Wainwright's September 1, 1987 letter, on Atlantic Coast Equities' letter head, was a loan commitment letter (But see Finding 30 *supra*., and further *assuming* that Robin Hairston had a reasonable basis to rely on that letter when she certified Hairston's financial qualifications on August 29, 1987 (But see Findings 26-29, 31-32 *supra*.), the record evidence still mandates the finding under Hairston Issue-3 that Atlantic Coast Equities did not have sufficient net liquid assets to fund the proposed loan to the Hairston partnership.

34. As previously noted (Finding 26 *supra*.) Atlantic Coast Equities was a sole proprietorship owned by Robin Hairston's friend and sometimes financial advisor, Philip Wainwright. At a prehearing deposition Wainwright testified that Atlantic Coast Equities existed from April through December, 1987. But at the hearing he said he started Atlantic Coast in January or February, 1987 and that it broke up at the end of 1987. In any event telephone service to Atlantic Coast was terminated in October 1987 (Tr. 6169). So the finding is justified that Atlantic Coast Equities' life was short-lived.

35. In the summer of 1987, in addition to Atlantic Coast Equities, Wainwright also operated another sole proprietorship, ABBA capital partners, which he described as a "venture capital intermediary" involved in real estate (Tr. 6099). He also operated an entity called "The Wainwright Group" with another person (Tr. 6050-6051).

36. Although Atlantic Coast Equities was a sole proprietorship when Wainwright signed the so-called September 1, 1987 loan commitment he identified himself as its "President." When asked why he referred to himself as "President," he replied that it was "just a way of doing business, just for convenience.," At its peak in the summer of 1987, Atlantic Coast only had assets of $10,000, comprised mainly of office equipment (Tr. 6098-6101). During its brief existence, Atlantic Coast didn't take deposits, never made loans, and wasn't subject to any federal or state regulatory commissions (Tr. 6170-6171).

37. Opposing counsel's efforts to pin down Atlantic Coast's exact function were less than successful. Wainwright kept vacillating. In a prehearing pleading he described Atlantic Coast as a "venture capital firm." On cross-examination he said it was "an investment banking firm." In response to a question, Wainwright responded that there is a significant difference between an "investment banking firm" and a "venture capital firm." But when he was asked if he considered Atlantic Coast Equities a "venture capital firm" he said, "we had a a shade of venture capital in us, but, no, sir, we were an investment banking firm" (Gonzales Phase III, Ex. 6; Tr. 6170, 6179).

38. Never at a loss for conceptual descriptions, at another point in the hearing, Wainwright described Atlantic Coast's business as "an investment banking financial intermediary" (Tr. 6099), that makes its money through "deal flow." "Deal Flow" means that Wainwright would match borrowers with lenders. If the loan was made, he would receive a percentage of the amount borrowed. That percentage could range as high as five percent.[12] Wainwright admits that even if Atlantic Coast Equities had wanted to make the $300,000 loan involved, it couldn't. It didn't have resources anywhere near $300,000 (Tr. 6165). Wainwright has never previously been involved in the construction of a broadcast station (Tr. 6153).

39. When Wainwright closed down Atlantic Coast in December, 1987, he never told Mrs. Hairston or Mrs. Hairston's attorney that the had done so (Tr. 6159). Sometime before the end of 1987, Robin Hairston learned that Wainwright was no longer in Atlanta. Although she has talked to him since, they haven't discussed Atlantic Coast's proposed financing. Nor has Mrs. Hairston ever asked whether his (Wainwright's) absence might have an effect on Hairston Broadcasting's proposed loan (Tr. 6440-6441).

40 Some findings on the August 29, 1987, and September 1, 1987 discrepancy (see Finding 25 and Footnote 6 *supra*.). In his written testimony Wainwright said that although his so-called commitment letter was dated September 1, 1987, it was written on August 31, 1987. At the hearing, however, Wainwright said the letter was written on August 28, 1987 (Tr. 6220). Gonzales introduced a substantively identical unsigned version of the letter dated August 28, 1987 (Gonzales Phase III Ex. 8, page 1).

41. Wainwright says that when he wrote the letter he relied on the notes he made of telephone conversations with interested lenders. But predictably he couldn't produce such notes. *See* Hairston Phase III, Ex. 3, pp. 4-5, and Finding 31 *supra*.). He says he sat down with pencil and paper and wrote out a draft of the loan letter, and that he read it to Hairston's counsel, Grier Raclin of HBRR. But predictably he no longer has the draft letter he prepared (Tr. 6121-6123). But the record does show that on August 28, 1987 HBRR attorney, Edward Taptich, sent a draft loan letter to Wainwright via facsimile. That draft didn't contain any of the specifics about this particular transaction that Wainwright claimed he gave HBRR (Raclin) over the phone (Tr. 6124). Moreover, Taptich didn't identify either Atlantic or Wainwright in the draft he sent (Gonzales Phase III, Ex. 8, p. 2).

42. Wainwright made handwritten revisions in Taptich's draft letter. In both the first and last paragraphs of the Taptich version, Wainwright struck out the word "lend" and inserted the word "arrange" instead. (Tr. 6114, 6116-17); Gonzales Phase III, Ex. 8, p. 2). The original of the September 1, 1987 letter from Atlantic was on photo copied letter head. Tr. 6137-6138. Wainwright said that he signed the letter and mailed it to Robin Hairston, and swears that he didn't cause the letter to be sent by facsimile to anyone (Tr. 6161). However, Hairston produced a copy of the letter in discovery that indicates that it was sent via facsimile from an Atlanta area telephone number on September 2, 1987. *See* Gonzales Phase III, Ex. 4.

43. Finally, some basic findings regarding Philip Wainwright's role in the development of Hairston's application is in order. Early on Hairston claimed that Wainwright was their agent. *See e.g.* Hairston Broadcasting's "Response to Motion for Production of Documents" filed March 1, 1989, at para. 4; FCC 89M-822, released March 15, 1989; and FCC 89M-1083, released April 5, 1989. Later, Hairston unsuccessfully tried to deny that Wainwright was their agent. *See* FCC 89M-1350 released May 5, 1989.

44. The record shows that Wainwright was never paid for any efforts he may have extended on Robin Hairston's behalf (Tr. 5440-5441). HBRR, Hairston's communications counsel represented Wainwright both at his deposition and at the hearing. However, Wainwright never paid the law firm a fee (Tr. 6136-6137).

45. *Hairston Issues 2 - 3: Intermediate Findings*. Hairston Issues 2-3 will be resolved adversely to Hairston for any one of several reasons. In the first place Hairston Broadcasting Limited Partnership bears the burden of proof on those two issues. *See* FCC 89M-383, released February 6, 1989. They have failed to meet their burden under either issue. They have failed to show that Robin Hairston truthfully certified Hairston Broadcasting Limited Partnership's financial qualifications on August 29, 1987. They have also failed to demonstrate that Hairston's purported lender, Atlantic Coast Equities, had sufficient net liquid assets, on September 1, 1987, to fund the proposed loan to the partnership.

46. Secondly, and *assuming* that Hairston didn't have the assigned burdens of proof referred to in Finding 45, the record adequately supports adverse affirmative findings; i.e., on August 29, 1987, Robin Hairston falsely certified the partnership's financial qualifications; and on September 1, 1987, Atlantic Coast Equities did not have the net liquid assets to fund the $300,000 loan to Hairston Broadcasting Limited Partnership.

47. When Robin Hairston represented, on August 29, 1987, that Hairston Broadcasting Limited Partnership had sufficient net liquid assets on hand or available from committed sources, she had absolutely no basis for doing so. She didn't even have the worthless September 1, 1987 loan letter from Atlantic Coast Equities in her possession. So she had no assurance whatsoever that her certification was either accurate or viable.

48. Mrs. Hairston, at the time of her certification, was aware that Atlantic Coast Equities was owned by her friend, and sometimes financial adviser, Philip Wainwright. So she knew that Atlantic Coast was not a bank or anything like a bank. Moreover, Atlantic Coast had no intention of lending money to the partnership, and indeed had no money to lend. In fact, Wainwright was "very careful" not to use language that would indicate that Atlantic Coast would lend Hairston the $300,000. Thus, the so-called September 1, 1987 loan commitment letter under the Atlantic Coast Equities letterhead was not only a sham, it wasn't even a decent accommodation letter. So even if Robin Hairston had the September 1, 1987 letter before her at the time she certified that would have given her no assurance that the certified funds were available.

49. Robin Hairston knew she had falsely certified the partnership's financial qualifications. Her inconsistent testimony on the subject demonstrates that (see Findings 26-29 *supra*.). In a last-ditch effort to cover up that misrepresentation, she contradicted herself, and was evasive and less than candid. In brief, much of her testimony under Hairston Issue 2-3 is unworthy of belief. So the intermediate finding must be made that Hairston Broadcasting Limited Partnership lacks the necessary character qualifications to be a Commission licensee.

HAIRSTON 4: - RF - RADIATION

50. There was no need for Hairston to adduce evidence on Hairston's contingent basic qualifying RF radiation issue. *See* 53 F. R. 35903 *supra*. at paragraph 11 and Issue 1, and FCC 88M-3042 released September 16, 1988 at paragraph 6. That issue was deleted at the Chief, Audio Services Division's request. *See* FCC 88M-3587, released October 26, 1988. So the RF radiation evidence that has been adduced will *only* be evaluated under the standard

comparative issue. *See* FCC 88M-3042 *supra.*; FCC 88M-3587 *supra.*; and FCC 88M-4189 released December 7, 1988.[13]

MCL - 1: - MCL'S SITE AVAILABILITY ISSUE

51. Under MCL-1 we must determine Mableton Communications Limited (MCL) has a reasonable assurance that its transmitter site is available. MCL, a limited partnership, has two partners. Ralph Crossley is the sole general partner and holds 95% of the partnership's equity. Skywave Communications Corp. (Skywave) is the sole limited partner and holds the other 5% equity. It was an agent of Skywave who *ostensibly* obtained MCL's specified site at a time when Skywave was considering filing its own application for Mableton. Skywave then traded its proposed engineering along with its proposed transmitter site to Ralph Crossley for its 5% limited partnership equity. Before the trade Crossley had intended to apply for Mableton as a sole proprietor. At that time he didn't have either an engineer or a transmitter site. So by trading 5% of MCL's equity to Skywave for already prepared engineering and what he believed was a button-downed transmitter site, Crossley believed he had made a good bargain, and had substantially advanced the preparation of BPH-870710NQ.[14]

52. The proposed site that Skywave later traded to Crossley is known as the "Marler" property. The agent that ostensibly obtained the original site for Skywave was Tim Perkinson, the son of Lee Perkinson, Skywave's president. This occurred in May, 1986. Tim Perkinson says that he believes that the man who assured him that a site was available was a Mr. Ralph Marler. Over two years later, on or about September 8, 1988,[15] Mr. Crossley received a telephone call from Ralph Marler. Marler told Crossley that he (Marler) had been advised that Crossley had indicated that he intended to build a transmitter tower on his property, that he had never heard of Crossley, and that he (Marler) didn't want a transmitter tower on his property (Tr. 5910, 5942, 5978).

53. Over a month later, on October 17, 1988, one of MCL's opponents, RML, moved to enlarge the issues against MCL. Among other things, RML asked for a site availability, and a site misrepresentation issue against MCL. Although they were fully aware that the "Marler" site wasn't available, MCL opposed RML's requests on November 7, and supplemented it on November 9, 1988.

54. It was during this pleading cycle that we became aware that the Marler property wasn't owned by Ralph Marler at all, but by his wife, Lois Marler, and his brother. Mrs. Lois Marler submitted a statement to the Commission saying that she owns the land in question, that her home is on that property, and that she has never had and has no intention now of making that property available for any other use. Based on those direct and unequivocal statements the Presiding Officer added the issues RML had requested. *See* FCC 88M-4034 released November 25, 1988.

55. On January 19, 1989, after the prehearing conference was held, and the parties had exchanged their direct case exhibits, and only five days before the evidentiary admission session was to begin, MCL filed still another petition for leave to amend.[16] There MCL tried to change transmitter sites. That request was denied. *See* FCC 89M-453 released February 9, 1989.

56. MCL concedes that its presently specified transmitter sites is not available. *See* MCL's petition for leave to amend filed January 19, 1989; Tr. 5408-5409, 5650, and 5910.

57. *MCL Issue 1: - Intermediate Findings.* Based on Findings 51-56 *supra.*, it is found that Mableton Communications Limited has no reasonable assurance that the Marler property transmitter site described in their July 10, 1987 application is available. Moreover, the record demonstrates that MCL never has had such a reasonable assurance. Since the "Marler" site isn't available, MCL has no transmitter site, and isn't basically qualified to be a Commission licensee.

MCL - 2: MCL'S FALSE FINANCIAL CERTIFICATION

58. Under MCL-2 we must determine if MCL has misrepresented the facts to or lacked candor with the Commission about their proposed transmitter site. As previously noted, it was Tim Perkinson, the son of Lee Perkinson (Skywave's president) that purportedly secured the "Marler" site. He ostensibly turned the documents on the transaction over to his father, Lee Perkinson, although there is some evidence of record that he may have sent information directly to Richard Biby. Biby was Skywave's and ultimately MCL's consulting engineering.

59. Neither Biby nor Lee Perkinson ever provided Crossley with any written documents about the Marler property's availability. Tr. 5959, 5974-75. Crossley took no steps before he filed MCL's application to ensure that the Marler site was available (Tr. 5979).

60. Crossley, MCL's 95% General Partner, says that, once he decided to apply for the Mableton frequency, he was interested in obtaining Skywave's engineering because he was "short on time," and didn't even have an engineer yet. He was also short on cash Tr. 5873-5874. When Crossley first contacted Richard Biby, Biby told him that there might be a problem with the transmitter site. Tr. 587. In fact, on July 9, 1987, Biby wrote Crossley. He said:

> "As we discussed in our telephone conversation this afternoon, the very short time in which we were required to produce this finished report precluded our normal level of checking and verification of this work product. You may rest assured that we feel that our work is correct and complete. . . .
>
> . . .
>
> "Also, please be aware that we have attempted to minimize your costs, particularly in view of the possibility that you may later want to amend this application." QRW Ex. 3.

In spite of this letter, and the circumstances surrounding Skywave's identification of the proposed site, Crossley claims he had no reasons to believe that the Marlers would not make the land available for MCL's use. Tr. 5878.

61. As previously noted (Finding 52 *supra.*) when Ralph Marler telephoned Crossley in September, 1988, the only person whom Crossley knew to be connected with the site was Ralph Marler; he did not know Mrs. Marler's first

name or Mr. Marler's brother's name. He didn't know the topography of the site; i.e., whether it was located on a rise or a hill or whether it was covered with trees (Tr. 5910-5912). That September, 1988, telephone conversation is the only time Crossley ever spoke to Ralph Marler, and he has never spoken with Lois Marler or Ralph Marler's brother, the property owners.

62. Lee Perkinson wasn't upset when MCL's counsel told him that the Marler tower site was unavailable. Perkinson says that given the circumstances " . . . I wouldn't want a tower right next to my house either." In fact, when Lee Perkinson learned that the site was unavailable, he didn't even contact the Marlers (Tr. 5675-5676). Lee Perkinson hasn't spoken with Richard Biby about MCL's site since he authorized Bibly to release the engineering work to Crossley (Tr. 5648-5649).

63. *MCL Issue - 2: - Intermediate Findings*. The false financial certification issue must be resolved adversely to MCL. On July 10, 1987, MCL's 95% General Partner, Ralph Crossley, *certified* that MCL had reasonable assurance that a transmitter site property; i.e., the Marler property, was available. But he had absolutely no basis for so certifying. He had done absolutely nothing to ensure that MCL did indeed have a site, although he had enough information to verify whether the site was available or not.

64. Neither Richard Biby nor Lee Perkinson, the President of the 5% Limited Partner who had ostensibly secured the Marler property, even provided Crossley with any written documents about the Marler property's availability, and Crossley never asked for any.

65. Ralph Crossley has never discussed with the Perkinsons what steps were taken to obtain assurance that the Marler site was available. He had and has never spoken to either of the site's owners, and at the time MCL filed its application, he didn't even know their names. It wasn't until September, 1988, when Ralph Marler telephoned him that Crossley spoke to anyone directly connected with the site. He is not familiar with the topography, and didn't know that MCL was proposing to place its tower on a hill covered with trees. In brief, on July 10, 1987, when Ralph Crossley certified that MCL had a transmitter site was available, he was about as mentally ill-equipped to do so as a person can be.

66. This is not to say that Ralph Crossley wasn't a truthful witness. He was. *See* FCC 89M-1457, released May 15, 1989 at paragraph 8. However, Crossley had no right to rely on the hearsay representations of Lee Perkinson. He had never met Perkinson,[17] and he had no documentary substantiation of the site's availability. Moreover, when Crossley first contacted Richard Biby, MCL's engineer, Biby told him there might be a problem with the site. Then, on July 9, 1987, the day before MCL filed their application Biby wrote Mr. Crossley. He warned Crossley that time limitations "precluded our normal level of checking and certification of this work product." Biby also indicated that he had tried to minimize MCL's engineering costs" particularly in view of the possibility that you may later want to amend this application." Thus, at the time he certified, Ralph Crossley had every reason to be certain the Marler site was not available.

67. Stated another way Ralph Crossley had no right to base his site *certification* on third-hand information provided by an individual he had never met, and who wasn't the landowner. Sworn representations simply cannot be based on such a frail factual predicate. MCL had the burden of proving that their representations about their transmitter site's availability were truthful. They haven't done it. They haven't even come close to sustaining Ralph Crossley's July 10, 1987 transmitter site certification. So even *assuming* that MCL's application would still have to be denied under MCL-Issue 2, the false financial certification issue.

THE STANDARD COMPARATIVE ISSUE
DESCRIPTION OF THE APPLICANTS AND STRUCTURAL DEFICIENCIES

68. *Mableton Broadcasting Company*. MBC, a Georgia corporation, has one class of stock, and two stockholders. Purportedly,[18] Vanessa O. Gragg owns 12.750 shares (51%) of MBC's stock, and Chairman of the Board of Directors, Vice-President, Secretary and Treasurer; Thomas L. Giglio owns 12,250 shares of MBC's stock (49%) and is President and a Director of MBC.

69. MBC's opponents have demonstrated that MBC's ownership is a sham built on its principals' willful an pervasive misrepresentations. The structure was built on Giglio's deceit, and nurtured by Mrs. Gragg's duplicity. Consequently, neither Mr. Giglio nor Ms. Gragg can be depended upon to carry out the ownership representations they made in BPH-870706ML.

70. Thomas L. Giglio became aware that the Mableton channel was available following the FCC's omnibus FM allocation proceeding. By December 1985, he had determine that he wanted to file an application for the Mableton frequency. (MBC Ex. 2, p. 2; Tr. 1040). He contacted the law firm of Leibowitz, Spencer, and Freeman (Tr. 966-967). They sent him a package of materials.

71. At that time, and still, Giglio was an employee of WQXI(AM) and (FM). Several of his co-workers were also interested acquiring a broadcast station either by purchase or through a construction permit application. In fact, a meeting was held on January 27, 1986, to discuss the possibility of applying for Mableton. Among the people who attended that meeting was Vanessa Gragg. Eventually the others who attended that meeting lost interest. But Giglio and Gragg continued to pursue the venture (Tr. 986-988).

72. From the outset Giglio intend to refinance his home to meet the costs of prosecuting the Mableton application (Tr. 991). He then planned to obtain conventional financing to construct and operate the station if he was successful. In February 1986 he did refinance his home and obtained $25,000 to invest in the venture. At about the same time he received a proposed retainer agreement with the Leibowitz law firm. He discussed and reviewed a variety of matters with the firm including the comparative advantages given minority ownership (RML Ex. 14, Tr. 966-967, 971 and 984). He also discussed the advantages of minority ownership with Vanessa Gragg (Tr. 972).

73. Giglio knew as early as the January 27, 1986 meeting that Ms. Gragg couldn't contribute financially to the project. She had nothing to invest. As Ms. Gragg puts it "I went on faith and a prayer" (Tr. 488). But still he approached Ms. Gragg and suggested that they pursue the Mableton FM project together (Tr. 985-988). Having made this decision, Giglio executed his retainer agreement with the Leibowitz law firm (see Finding 72 *supra*.). He paid the retainer to this law firm from his personal account (Tr. 858).

74. In early June 1987 Giglio's counsel notified him that the Mableton FM filing window had opened. Giglio and Ms. Gragg had been discussing what business structure their venture would take. A local CPA had suggested that they might use a general partnership until the business became profitable and then shift to a corporation. But Ms. Gragg was uncomfortable with this suggestion (Tr. 515, 1038).

75. On June 5, 1987, Mr. Giglio and Mrs. Gragg met with Mrs. Gragg's attorney, Warren Hayes, to consider the business structure further. During the meeting Giglio told Hayes that the FCC looked favorably on minority controlled applicants. Where upon Hayes suggested that Ms. Gragg be given a 51% ownership, and Giglio 49% since such a structure would be considered minority owned and controlled. Mr. Giglio agreed to the 51/49% structure. Since he wanted a station, he was willing to fund the entire capitalization of the company while giving up control. He was willing because of what he regarded to be "a special relationship" he had with Vanessa Gragg. He had previously agreed to pick up all the prosecution expenses when he signed the Leibowitz retained agreement back in March of 1986 (see Findings 72-73 *supra*. and Tr. 1043).

76. Hayes was instructed to set up the entity capitalized at $25,000 - a figure Giglio selected (Tr. 1048). MBC was incorporated effective July 15, 1987. Among the corporate documents that Giglio offered to support his divest case was a copy of MBC's organizational meeting minutes. They were dated July 22, 1987. However, on cross-examination, Giglio admitted that no meeting was held on that date.[19] He indicated that he had prepared fictional corporate minutes and placed the date July 22, 1987, on them because he thought it was a good date to place on the documents.[20]

77. Ms. Gragg also tried to conceal the preorganizational sham. She said she had reviewed the corporate mintues formalizing her various agreements with Giglio on or before she received her stock certificates, and that the stock certificates " . . . were issued on September 1, 1987."

78. At the hearing it developed that no such meeting had taken place on July 22, 1987; none of the formal actions represented by the various documents submitted in evidence had occurred; no. stock subscription agreements had been presented or entered into; and no other organizational meetings were held on that date or later. In fact, it was not until October 1987 that the MBC stock certificates were issued and a stock ledger set up. It was then that Giglio backdated the certificates to September 1,1987; i.e., to a point in time prior to the cut-off date.[21]

79. At that time, no money had been paid into MBC, and no bank account for the company had been established. MBC did submit as part of its direct case a commercial signature card for MBC that carried the typewritten date of November 9, 1987, as well as Giglio's and Ms. Gragg's signature. But, under cross-examination, Giglio admitted that MBC's account was not opened until April 4,1988.

80. Even MBC's transmitter site proposal is flawed. Before MBC was formed, Giglio learned that a Mr. Frank Daniels had a property which might be available. Giglio met with Mr. Daniels, but made no attempt to obtain an expression of Daniel's willingness to make the site available. No price or terms were discussed at the meeting. Giglio says that he felt such an attempt would be futile (Tr. 1014). Instead, and sometime after the meeting, he wrote Daniels and indicate that he wanted to "negotiate or lease" a site from him (a decision as of then undecided). Giglio closed his letter saying he hoped they would be able to "talk business soon." Daniels never responded to Giglio's letter. After MBC filed its application Giglio sent another letter to Mr. Daniels. That letter was meant to keep Mr. Daniels claim in case he (Daniels) should see public notices in the paper that referred to his land as a transmitter site.

81. Not only is MBC's ownership structure a maze of misrepresentations, and not only is their transmitter site proposal falsely premised, their financial proposal is misleading in the extreme. At the outset Giglio believed that he had enough money to prosecute the application through to a grant. But he never anticipated facing 17 competing applicants. Several weeks before the Mableton window filing was announced, Giglio prepared and submitted a loan proposal to the C and S National Bank in Atlanta. While the proposal was submitted in the name of a general partnership (Giglio and Ms. Gragg), the only personal financial statement accompanying that proposal was his. The bank rejected the proposal because it did not make loans for start-up projects (Tr. 1052).

82. Later Giglio and Gragg contacted a Mr. Walter Threadgill of the Minority Broadcast Investment Corporation (MBIC). They submitted a copy of their revised proposal to him. Threadgill then sent MBC a letter. There MBIC confirmed "its present intention to consider providing $300,000 of financing" but described the terms of the letter as not being "all inclusive." It *subsequently* developed that MBIC wanted a 25% interest in any settlement MBC negotiated as well as warrants for 40% of MBC's stock, exercisable over 3 to 5 years.

83. At the time MBC filed its application, and certified to its financial qualifications, its only basis therefor was the MBC letter. It is obvious that MBC's financial structure is as flimsy as its ownership structure and as elusive as its transmitter site proposal.

84. There is another reason that MBC's ownership proposal must be rejected. Vanessa Gragg, MBC's 51% owner, is a thief. She has stolen $5,000 worth of corporate funds. In order to meet the expenses of prosecution, Giglio turned the $25,000 (see Finding 72 *supra*.) over to Ms. Gragg. She deposited that sum in an account, Van's Word Processing Plus Account. This was on or about November 9, 1987. By the spring of 1988, Giglio began urging Ms. Gragg to set up an account for MBC so he could get reimbursed for various funds he had advanced. He also wanted MBC's funds placed in an interest bearing account. Ms. Gragg stalled. It was not until April 4, 1988, that she opened the Bank South account. It was at this point that Giglio learned that Ms. Gragg no longer had his $25,000.[22] She had spent $5,000 on personal expenses, and had done so without Giglio's knowledge, or permission.

85. Giglio regards the missing $5,000 as an obligation of Ms. Gragg. But there is no note or other document evidencing the obligation. Ms. Gragg insists she owes Mr. Giglio "nothing;" however she does acknowledge this debt to him (Tr. 829).[23] Since this incident Mr. Giglio has kept possession of the checkbook. When MBC checks are needed he brings them to Ms. Gragg to sign. In other words, Giglio now handles the checkwriting function even though Ms. Gragg is the treasurer.

86. Thomas Giglio's handling of the $25,000 capitalization money has been almost as shabby as Ms. Gragg's misappropriation. When he agreed to split MBC's ownership on a 51/49% basis; i.e., giving Vanessa Gragg the majority interest, he viewed it as a no-strings-attached gift. Ms. Gragg doesn't view it that way. She says she's entitled to a majority stock position because she is a black female, experienced in broadcasting, who works hard. She also labors under the misapprehension that since the Mableton frequency is an 80/90 allocation it must be minority controlled.

87. In any event, and even though he had decided to give the stock to Ms. Gragg, Giglio was concerned that his funding of the venture might weaken MBC's comparative position in a hearing; i.e., since he was furnishing all the money, control might be attributed to him. So he devised a scheme to make it appear that Ms. Gragg had, in fact, used her own funds to buy her interest.

88. To do this, he met with Ms. Gragg, and a fellow WQXI employee, Fleetwood Gruver, to formulate and implement a plan. They held their meeting on September 9, 1987 at WQXI's studios. In Ms. Gragg's presence Giglio told Gruver that he wanted to funnel $12,750 of his funds through Gruver to Ms. Gragg so she could purchase her MBC stock interest. He said he was using this approach " . . . in case sometime in the future we don't want this traceable (Tr. 1095). Gruver asked Giglio if he simply wanted to exchange checks. Giglio rejected that idea.

89. Instead, Giglio proposed to write Gruver a check for more than the $12,750 that Ms. Gragg would need to pay for her stock. He chose $12,932.50. Gruver agreed to participate in the scheme, and Ms. Gragg acquiesced. Giglio wrote the check for $12,932.50, and Gruver deposited it into his account. Gruver then waited for two or three days before writing any checks to Ms. Gragg, because she didn't have a checking account over which she had exclusive control. After she opened an account in the name of Van's Word Processing Plus, Gruver wrote two separate checks to Ms. Gragg for $10,000 and $2,749.[24] She deposited those two checks into the newly established account (Tr. 864). Gruver then issued a check to Mr. Giglio for $183.50 to cover the difference in the total amount he had received from Giglio.

90. Mr. Giglio then issued a check to Ms. Gragg for an additional $12,250 for his 49% share, which she also deposited in Van Word Processing Plus account. Thus, the total that Mr. Giglio contributed, directly and indirectly, was $24,999.00[25] and Ms. Gragg contributed $1.00.

91. Giglio created this trail of multi-party checks in varying amounts so that the distorted totals would make it more difficult to trace the money to him. Also, the checks were issued over four days so the date of origin would not coincide on a single day (Tr. 1169-1170). At the hearing Giglio first tried to defend the scheme. He said it was not intended to deceive anyone but only to allow Ms. Gragg to testify truthfully that she had bought her stock with her own funds (Tr. 1207). But he quickly abandoned that position, and admitted that his true intent was to deceive people into thinking that Ms. Gragg had paid for her stock (Tr. 1208).[26]

92. Giglio acknowledge that he had been troubled by his proposed scheme, but he didn't review it with his counsel, because his counsel would have told him not to do it (Tr. 1212-1213).

93. *Intermediate Findings - MBC*. Under no circumstances could this Presiding Officer recommend a grant of MBC's application. Through sheer duplicity Thomas Giglio and Vanessa Gragg have concocted a sham application. The ownership structure is a sham based on fictional corporate minutes, false stock ledgers and other post-dated documents that Giglio prepared. Ms. Gragg swore that the false dates Giglio has used were accurate (Findings 76-79 *supra*.). The transmitter site proposal is a sham; Giglio falsely certified that MBC had a reasonable assurance that its proposed transmitter site was available (Finding 80 *supra*.). The financial certification is a sham. Mr. Gragg had absolutely no basis for representing that sufficient net liquid assets were on hand or available from committed sources to construct and operate their proposal.

94. MBC's ownership structure is flawed from another aspect. They tried to make it appear that Vanessa Gragg had used $12,750 of her own money to pay for her 51% stock interest. They did so through an elaborate money laundering scheme (Findings 87-92 *supra*.). That Ms. Gragg had no funds of her own was subsequently revealed, when she stole $5,000 of MBC's (Giglio's) funds (Findings 84-85 *supra*.). So what we have is a completely sham application put together by two individuals who are little more than petty swindlers. They needn't be given any serious comparative consideration.

95. *Gonzales Broadcasting Corporation*. GBC, a Georgia Corporation, has one class of common stock, and ostensibly two stockholders. They represent that Sue Gonzales Polk is the Corporation's President, a Director, and owns 51% of the stock. They further represent that her husband, Laurence Norton Polk, is Vice President, Secretary, a Director, and owns 49% of GBC's stock. GBC's opponents have demonstrated that GBC's structure is at complete odds with reality, and that there is little, if any, chance that GBC integration proposal will be implemented as proposed. Opponents have proved that both of these representations are abjectly false; that GBC's structure, as represented, isn't *bona fide* ; that GBC, in reality, is totally controlled by Laurence Norton Polk; and that Sue Gonzales Polk is nothing more than a comparative front for her husband. GBC's opponents have further proved that Sue Gonzales Polk is incapable of carrying out her integration pledge.

96. Sue Polk, born Sue Beverly Gibson on July 7, 1931, moved to the Atlanta area in 1947. She attended high school and graduated from beauty school in 1948. She opened her own beauty shop in 1947, at the age sixteen, even before she graduated from beauty school.

97. Laurence (Larry Polk) Polk was born on May 21, 1929. In 1964 and 1965 he was salesman and announces for WAIZ, Hopeville, Georgia. In 1966 Polk purchased WYNX-AM, Smyrna, Georgia. He was the sole shareholder and corporate owner until he disposed of it in May 1985. He married Sue Polk in November 1975.

98. Early in 1985, Ken Larkin, a former WYNX consulting engineering, told the Polks that the FCC was making frequencies available in Mableton, and Roswell, Georgia (Tr. 1288, 1798). Mrs. Polk was hopelessly confused about this preliminary fact, and as a result she butchered the record. She initially said that Larkin had contacted Mr. Polk in 1985 an told him about frequencies being available in Mableton, and in Rockledge, Florida (Tr. 1288). Later she said that Larkin hadn't told them about the Mableton frequency until after the Polks had asked that GBC's Rockledge application be dismissed (Tr.

1418). Then on redirect examination she said that Larkin had told them of redirect examination, she said that Larkin had told them of Mableton and Roswell in early 1985 (Tr. 1769), and that GBC's counsel had told them of the availability of the Rockledge channel (Tr. 1771).

99. The Polks formed GBC so they could apply for a construction permit in Rockledge, Florida (Tr. 134. At that time they were also considering applying for the Mableton frequency (Tr. 1635). They contacted a local attorney, Jim Peters, and asked him to form a corporation and told him of the percentage ownership each wanted (Tr. 1342-1347). Mrs. Polk says they first talked with Mr. Peters in October 1986 after they had filed their Rockledge application in September 1986 (Tr. 1343). Actually the Polks formed GBC before filing for the Rockledge permit in November 1986 (Tr. 1636).

100. GBC's ostensible ownership deviates from the Polk's usual pattern. Mr. and Mrs. Polk both have stated that they treat all their assets as commonly owned assets. That is, whatever is his is hers and whatever is hers is his (Tr. 13000, 1336, 1650-51, 1892). That testimony simply doesn't correspond with reality.

101. Station WYNX was held only in Laurence Polk's name. They had been married ten years when he sold the station. Yet all the proceeds were kept in his name; none were or are in Mrs. Polk's name. Larry Polk has bought several pieces of real estate with this sale; all of them are solely owned by him (Tr. 1300, 1356, 1862, 1880, 1911). The Polks' present residence was purchased in June 1987. This home is also in Mr. Polk's name alone (Tr. 1300).

102. Ms. Polk has no assets of her own. Other than her personal effects of her only asset is her GBC stock. Mr. Polk paid for that (Tr. 1862). She also maintains a minimal balance checking account with funds that Mr. Polk supplies (Tr. 1888). While they assert that they "share" all assets, Mrs. Polk claims that the 51% interest in GBC is hers and hers alone (Tr. 1650- 1651), even though Mr. Polk paid for it from his personal account (Tr. 1844-46).

103. Again, on this topic of who paid for the GBC, Mrs. Polk vacillated. First she stated that the funds used to pay for the GBC stock were advanced from "our accounts" but which is money legally maintained in only Mr. Polk's name (Tr. 1356). She thought that the stock had been paid for sometime in 1986 (Tr. 1616). In fact, Mr. Polk paid for the GBC stock in July, 1987 (Tr. 1843, 1858, Jelks Ex. 8). On redirect she changed her testimony, and claimed that she had paid for her shares of GBC stock (Tr. 1792).[27]

104. These shares of GBC stock also constitute the only business asset Mr. Polk has ever given Mrs. Polk. When asked why he had never put any other assets in his wife's name before GBC was formed, Mr. Polk said that their relationship had matured over the time (Tr. 1891-1892) that doesn't explain why he gave her 51% of GBC's stock in 1986, but kept full title to the new Mableton residence he bought the following year (see Finding 101 *supra*.).

105. Mrs. Polk claims she was made majority owner of GBC was because she wanted to have complete control and authority and to be the general manager (Tr. 1354, 1367). She also indicated that Mr. Polk was tired of being in a supervisory role (Tr. 1349), and that he wanted Mrs. Polk to gain confidence (Tr. 1890, 1906). On the other hand Mrs. Polk admitted that no reason exists why she could not hold 51% of the stock and still be GBC's president and general manager (Tr. 1354).

106. Mrs. Polk labored under the same misapprehension as Vanessa Gragg (see Finding 86 *supra*.). She believed that you have to be a minority to apply for an 80/90 allocation (TR. 1638). She further believes that an 80/90 applicant has to be majority controlled by a minority to receive comparative credit from the Commission (Tr. 1354, 1641).

107. GBC opened its initial bank account in Bank of the South in July, 1987 (Tr. 1858). This deposit was from the $10,000 paid in capital at that time (Tr. 1845). Subsequently Mr. Polk opened GBC's second account in Community Bank and Trust in August, 1988. This account indicates that GBC's tax identification number is identical to Mr. Polk's personal tax identification number. Furthermore, the second bank account indicates that Mr. Polk is GBC's treasurer (Tr. 1852-53, MCL 76 Ex. 10, Jelks Ex. 8).

108. On this subject of the corporate treasurer, Mrs. Polk again butchered the record. When she was first asked who held what offices in GBC, she said she was the treasurer "because I sign the checks" (Tr. 1350). Later she said that GBC never had a treasurer because Peters (see Finding 99 *supra*.) had not selected one when he drew up the corporate papers (Tr. 1574-1617).

109. In the GBC, Directors' Initial Organizational Minutes in the resolution about officers the word 'treasurer' was crossed out. Yet the very next resolution states that the "treasurer shall reimburse expenses incurred . . . " Mrs. Polk says that the Polks implemented this resolution, but failed to catch the references in the document even after reading it and signing it (Tr. 1620-1622, MCL Ex. 11 at p. 9).

110. Mrs. Polk also testified that GBC had never represented to the Commission that it had a treasurer (Tr. 1694). But in GBC's Rockledge application, which she helped prepare, Mr. Polk is listed as the corporation's treasurer. When Mrs. Polk was shown the second bank account (see Finding 107 *supra*.), the account that lists her husband as GBC's treasurer, she claimed the bank made a mistake (Tr. 1618; MCL Ex. 10).

111. Sue G. Polk also muddled up the evidentiary record on the question of GBC's capitalization. GBC's Articles of Incorporation reflect that GBC was originally authorized to issue 1,000 shares of stock (MCL Ex. 15; Tr. 1603- 1604).[28] But, Ms. Polk first stated that thee was never a time when the authorized shares were not 10,000 (Tr. 1602-1603). A short time later she claimed that that statement was a mistake (TR. 1605).

112. At another point she testified that she and her husband were initially issued 2,000 shares, and that too was a mistake because only 1,000 shares were authorized (Tr. 1594-1595, 1605). But she then vitiated that testimony by asserting that their (GBC's) error was initially issuing 10,000 shares.[29]

113. Mrs. Polk couldn't even testify accurately about *when* GBC's stock error was corrected. She said that the old certificates were cancelled and the new ones were issued after she was deposed on November 14, 1988 (Tr. 1595, 1604, 1608, 1609). *All* the stock certificates, including the corrected ones, were exchanged with the parties on November 7, 1988 (Tr. 1610). Moreover, GBC's annual shareholder's minutes for December 4, 1987 indicate that Mrs. Polk had 1,020 shares and Mr. Polk had 980 shares almost a year before she was deposed (MCL Ex. 14; Tr. 1633).

114. Mrs. Polk also has said repeatedly that she signed all four of GBC's stock certificates on December 4, 1986 (Tr. 1613-1615). Since he believed that that testimony was factually inaccurate, the Presiding Officer asked her if she signed all *four* certificates (the originals and the corrected ones) on the same day. She then replied, "I don't think so . . . " (Tr. 1615). But she immediately reverted to her prior testimony that she had signed all four certificates on December 4, 1986 (Tr. 1616).

115. It was impossible to ferret out the truth with Mrs. Polk.[30] Whenever discrepancies in her sworn testimony were pointed out to her, she'd simply reply that she had made a mistake or a boo-boo. She used this device at least eleven times (Tr. 1359, 1418, 1434, 1441, 1445, 1605, 1647, 1649, 1654, 1769, 1803).

116. *Intermediate Findings - GBC*. GBC's ownership structure, as represented is a classic sham. Sue G. Polk, the purported 51% owner, and President has neither the aptitude nor the experience to control a broadcast corporation and its operations. She is befuddled; she is confused, and as a result her testimony was nothing more than a long series of mistatements. She is incapable of carrying out GBC's integration pledge. So Gonzales Broadcasting Corporation will be awarded 0% integration credit.

117. *Bolton Broadcasting Limited*. BBL is a Georgia Limited Partnership, made up of one general partner, and one limited partner. The general partner is Janet Bolton who owns 20% of the equity of the partnership. The limited partner is a corporation, Mableton FM Investors, Inc (MFM). MFM owns the other 80% of the partnership equity.

118. MFM is a Georgia corporation, incorporated on July 10, 1987. A Sub-S Corporation under Federal Tax Law, MFM has five stockholders who each own 20% of its stock: Dr. C. Gary Bullard from Austell, Georgia; James M. McCarter, Atlanta, Georgia; Rhys T. Wilson, Atlanta, Georgia; J. William McArthur, Jr., Atlanta, Georgia; and Dr. T. Reid McArthur, Vidalia, Georgia.

119. Like Mableton Broadcasting Company (Findings 68-94 *supra*.) and Gonzales Broadcasting Corporation (Findings 95-116 *supra*.), BBL's opponents have attached their proposal as being a "sham." But unlike Mableton Broadcasting Company, and Gonzales Broadcasting Corporation, this time BBL's opponents have failed.[31]

120. Assisted by counsel and by an engineer, Janet Bolton was personally and materially involved in preparing and prosecuting BBL's application (Tr. 1982-83, 2365, 2370, 2373-74, 2387-88 and 2485). She retained counsel (Jelks Ex. 10; Tr. 1963, 2457, and 2733-34). She located a tower site, visited the tower site area, met with the tower site owner, and typed the tower site agreement (Tr. 1945-48, 1952-53, 2017, 2368, 2416, 2441).

121. She traveled to Washington, D. C. to fill out and sign the application, executed the FAA form, reviewed the limited partner's financial qualifications, reviewed the cost estimates for the proposed station, and certified BBL's financial qualifications (Tr. 1942, 1958, 1980-1984, 1990, 1997-2001, 2011, 2327, 2458-2460).

122. Janet Bolton provided information for the program service statement, provided information for the station's equal opportunity program, reviewed the engineering section of the application, arranged for local public notice and a local public inspection file, and opened and controls BBL's checking account (GBC Ex. 7; Tr. 2007-08, 2013-14, 2038, 2042, 2047-49, 2473-74, and 3237). BBL's tax identification number is Janet Bolton's Social Security number (Tr. 2404), and she maintains BBL's records (Tr. 2047).

123. Ms. Bolton has continually communicated with counsel about the prosecution of BBL's application. She has provided information for preparing hearing exhibits; she handles the payment of counsel's fees; and she spend her own money to travel to Washington, D.C. for both the deposition and the hearing for which she will not be reimbursed (Tr. 2039, 2041, 2081, 2313, 2316, 2475). She personally paid for the local notice of publication and hasn't been reimbursed for it (Tr. 2081, 2473-74, and 2508). She knows how much money has been invested in BBL and BBL's principal place of business is her residence (Tr. 2392-2393, 2958).

124. *Intermediate Findings - BBL*. The foregoing findings (Findings 120-123 *supra*.) along with an analysis of BBL's Limited Partnership agreement (Bolton Ex. 8) and the limited role the corporate members of the limited partners have assumed (Jelks Ex. 11, pp. 1-2; Tr. 2325, 2727-28, 2767-68, 2781, 2798, 2957, 2974-76, 3190-91, 3233, and 3266), not only permit, but mandate an intermediate finding that Bolton Broadcasting Limited is a *bona fide* limited partnership, not a sham, and therefore entitled to comparative consideration.

125. *Voth Broadcasting Company*. Voth Broadcasting Company's application has been dismissed, and so there is no need to make findings on their legal structure. *See* Findings 6-9 *supra*.

126. *Radio Mableton Limited*. RML, a Georgia Limited Partnership, has four partners, two general partners and two limited partners. The two general partners are Charlotte A. Timms who owns a 25% equity interest in the partnership and Ken Childs who also owns a 25% equity. Both Timms and Childs reside in Carrollton, Georgia. There is no evidence that either of their residence are within the 1 mV/m contour of the proposed station. Nor is their any evidence that Timms or Childs will relocate to Mableton. The two limited partners are Mitt S. Conerly and Leonard H. Carter. They each own a 25% equity interest in RML.

127. RML will be awarded 0% quantitative integration. They have failed to present a concrete integration proposal for Charlotte Timms, and only a limited yet deficient integration proposal for Ken Childs. These evidentiary failures came about as follows.

128. December 13, 1988, RML exchanged its direct case exhibits. Although RML exchanged biographical data on Charlotte Timms (RML Ex. 2) and on Ken Childs (RML Ex. 3), those exhibits didn't set out an integration proposal for either one. At the evidentiary session held more than one month later, on January 24, 1989, RML identified and offered its Exhibit 2, Charlotte Timms' direct written testimony. The Presiding Officer sustained a relevancy objection to RML Exhibit 2, since there was no integration proposal to tie it to (Tr. Vol. 2, 179-180, 183 and 201). RML argued that their failure to present a written integration proposal was inadvertent, and asked for permission to submit a reformed Exhibit 2, and the Presiding Officer gave RML that permission.

129. On January 30, 1989, RML filed a Motion to Reform and included as part of that motion a reformed exhibit containing an integration claim. But the Presiding Officer was forced to deny RML's motion when he dis-

covered that by granting it; i.e., by showing any degree of equitable favoritism to RML, he'd completely lose control of this multi-applicant proceeding (see FCC 89M-516 released February 14, 1989.

130. At the same January 24, 1989 evidentiary admission session RML also offered its direct case Exhibit 3, the written testimony of Ken Childs. That exhibit was received in evidence without objection, although Exhibit 3 suffered from the same deficiencies as RML Ex. 2 (Tr. 204). Then RML asked for permission to also reform that exhibit. That request was denied (Tr. 207-208). Even so, RML attached a reformed Exhibit 3 to its January 30, 1989 motion. There RML sought to identify the position that Childs would occupy at the station, and they specified the nature of the duties and responsibilities he would undertake. That attempt was also denied (see FCC 89M-516 *supra.*). So RML will not be given any quantitative integration because it has failed to present a case that would permit quantitative integration to be awarded.

131. *Metropolitan Management Corporation.*[32] MMC, a 1987 Georgia Corporation, represents that its sole owner, and sole principal is Randal A. Mangham. That's what MMC's Mableton application shows, and that's the representation that Mangham affirmed during the hearing (MMC Ex. 2, p. 1; Gonzales Ex. 11, p. 2; and Tr. 3921).

132. However, later in the hearing Randal Mangham conceded that MMC's Board of Directors includes two individuals that were not named in Metropolitan's application, Darrel Gaitwood and Dorothy Nash. Mr. Gaitwood has had several media jobs, jobs in television, radio, film engineering, and film production. Mangham admits that he has discussed "business matters with Dorothy Nash and Darrell Gaitwood on an advisory capacity" (Tr. 3936-37).

133. Moreover, MMC's Articles of Incorporation, ratified on July 7, 1987 - three days before the application was filed specify Ms. Nash and Mr. Gaitwood as directors. Yet MMC never identified these two people in their application and never mentioned them in its organizational structure exhibit. In brief, MMC concealed their identity and revealed them only on cross-examination (MMC Ex. 1; Tr. 4001-4002). Although Mr. Mangham read the instructions accompanying the Form 301 application, he didn't name Ms. Nash and Mr. Gaitwood in the MMC application because "they have no equity interest in the corporation" (Gonzales Ex. 12, p. 3; Tr. 3922-3923).

134. MMC's application also fails to list two of its officers, Mr. Nash (MMC's Vice-President), and Mr. Robert M. Higgenbotham (MMC's Secretary). Compare Gonzales Ex. 11, p. 2 with MMC Ex. 1, p. 1; Tr. 3923-24). Higgenbotham, an Atlanta resident and businessman, was at one time a client of Mr. Mangham, and he has subleased space from Mangham (Tr. 3923-24).

135. MMC's public notice about the filing of its application failed to identify any corporate officers other than Mangham. Mangham, himself, was not certain of the newspapers where the notice was published, but he was certain that the notice was only published twice, on October 21 and 27, 1987. MMC has never adopted bylaws or issued stock to its shareholder (Tr. 3935-36). Mangham says he ordered a kit containing blank stock certificates but "did not follow it up." He admits that he has no record that he ordered the kit, that he has never received the kit, and that he has never reordered it (Tr. 3963-65).

136. Based on the foregoing (Findings 131-135 *supra.*), it's clear that MMC has seriously misrepresented its ownership structure to the Commission. Moreover, it has made it extremely difficult for its opponents to test the legitimacy of that ownership structure by refusing to make relevant documents available. As previously noted (Footnote 32 *supra.*) it started to stone-wall discovery during the pretrial. These tactics continued through the hearing. Several examples of such document abuse will suffice.

137. For example, MMC claims to be relying on a financial commitment letter they received from Independence Federal Savings and Loan. But they never produced a copy of that letter and assert that it cannot now be located (Tr. 3907, 3905-55, 3995-3999 and 4025).

138. On or about July 7, 1987, Mr. Mangham says he opened an account with Bank South on behalf of MMC. However, he produced no Bank South checks until the first day he testified. At that point he produced the fronts of seven checks. But he didn't make the backs of those checks available. The Presiding Officer asked MMC to make the backs of the checks available. They have never done so (Tr. 3927, 3980-3981).

139. Mangham says he has paid MMC expenses out of (1) a Shearson Lehman Brothers Financial Management Account, (2) from his personal account, and from his law office (Tr. 3926-31, 3976-3980). But he could produce no such checks.

140. Mr. Mangham says he prepared a budget for MMC's station with his attorney's assistance. That budget indicates that some unidentified "limited partner"[33] will advance funds to the applicant (Gonzales Ex. 13; Tr. 3947-3948). First he said the budget was typed in his own office on or about July 2, 1987 (Gonzales Ex. 13, Tr. 3946-3950). But later he said that he " . . . had Mr. Hart set down the budget (Tr. 3981). Initially he claimed that the budget he produced is the *final* draft of MMC's budget, after having gone through *other* drafts (Tr. 3948). A short time later the budget was the *only* drafts he prepared (Tr. 3939-3950).

141. MMC didn't publish its local notice of filing its application until several months after the Commission's required deadline for such notice. They were also late publishing their local notice of hearing.

142. *Intermediate Findings - MMC.* The record evidence abundantly that MMC has misrepresented its ownership structure, and then tried to conceal those misrepresentations by stone-walling discovery.[34] Equally important, the record shows that MMC really has made no serious effort to prosecute its application. Consequently, it is entitled to no quantitative integration credit, and will be awarded the 0% previously referred to (Footnote 32 *supra.*).

143. *Lorenzo Jelks.* Lorenzo Jelks (Jelks) is an individual applicant. Although the record shows that Jelks is not basically qualified to be a Commission licensee. (see Findings 10-13 *supra* and 14-16 *supra.*), no one has questioned his ownership structure.

144. *QRW, Partners, Limited Partnership.* QRW represents itself to be a Mississippi limited partnership comprised of four people, one general partner and three limited partners. The general partner is Gloria Watkins who purportedly *only* holds a 10% equity in the partnership. The other three limited partners who hold 90% of the equity are William Dilday (30%), Henry Flowers (30%), and Porter Sanford III (30%).

145. QRW will be denied any quantitative integration credit for anyone of three reasons. First of all, the ownership structure QRW has presented to the Commission is seriously flawed, both from an equity and a financial standard point. Secondly, QRW's opponents have demonstrated that the so-called general partner, Elona Watkins, is a mere front for limited partner William Dilday, a career broadcaster, and an investor in FCC construction permit applications. Thirdly, the record shows that the general partner Gloria Watkins is evasive and lacking in candor. She has neither the character nor the ability to carry out QRW's integration proposal.

146. While QRW represents that Gloria Watkins has 10% of its equity, from the outset Ms. Watkins has been looking for another general partner to take half of her equity (Tr. 4655, 4676, 4731-4732, 4967, 5083, and 5103). She was especially interest in locating a black female who lives in the Atlanta area. So at its focal point (the general partner), QRW's integration proposal lacks the permanency the Commission seeks in its permittees.

147. The same lack of ownership permanence permeates QRW's financial structure. On July 8, 1987, when she certified to QRW's financial qualifications, Ms. Watkins was relying on a loan commitment letter she had obtained from an organization called Sun-Delta Access Center, Inc. (Sun-Delta).[35] However, the face of the loan letter itself requires that Sun-Delta be given an unspecified equity percentage in the applicant in return for making a loan. When Ms. Watkins was asked about this on cross-examination, she was unable to specify how much of an equity interest Sun-Delta would obtain, or where that equity percentage would come from (Tr. 4551-4552, Thomas Ex. 6).

148. Even the circumstances under which Ms. Watkins obtained the letter reek of impermanence. Ms. Watkins met with a Howard Boutte, Jr., a Sun-Delta representative in early July, 1987 (Tr. 4546). Her approach was unbashedly bare-bones. She simply asked Boutte to prepare a letter indicating that Sun-Delta would lend QRW so much money for the Mableton station, a figure given to her by counsel (Tr. 4780-4781). She provided Sun-Delta with nothing more -- no proposed operating budget (Tr. 4780), no QRW balance sheet (Tr. 4779, 4781), no balance sheet for QRW's principals (Tr. 4781), and no loan application (Tr. 4781). Boutte said he'd get back to her. Later, he called Ms. Watkins, and told her she could pick up the letter (Tr. 4547; Thomas Ex. 6).

149. Moreover, Gloria Watkins knew very little about the organization she was purportedly dealing with. She thought Sun-Delta was "some type of MESBIC" (Tr. 4555). When asked what Sun-Delta meant in its letter when it said they had "completed . . . initial review of [her] request," Ms. Watkins had no idea what that meant (Tr. 4558). So there is no question that QRW's ownership structure is both impermanent and flawed.

150. Next the record demonstrates QRW is not a *bona fide* partnership. While Ms. Watkins claims that she is fully responsible for QRW's proposal, QRW is actually the alter ego of William Dilday. The idea for the QRW application began with Dilday. It was Dilday who approached Ms. Watkins. He called her and alerted her that the Mableton frequency was available; he provided her with a "sample" copy of a limited partnership agreement he had used in prior hearings; and he directed her to QRW's other two investors.

151. It was William Dilday who first committed to back Gloria Watkins; he recommend communications counsel to her; and it was Dilday who personally encouraged the others to join the venture.

152. William Dilday is the most knowledgeable one in the group when it comes to broadcast management and the FCC processes; he provided Ms. Watkins with basic estimates of FCC hearing costs and discussed comparative hearing criteria with her; and it is Dilday who has provided the major part (almost half) of the funds committed to the venture.[36] In fact the record justifies the finding that Dilday selected the limited partnership ownership structure for QRW, as opposed to a corporate or general partnership structure (Tr. 4864).

153. On the other hand, Ms. Watkins' capital contribution remains at her original $450. She has not yet met one capital call. So her so-called 10% interest continues to be diluted.[37] She had almost no involvement in the preparation of the application. Rather she simply rubberstamped a turn-key application which she neither remembered nor understood.

154. For example, she had no idea what the station's staffing plans were; she couldn't recall any of the specifics on William Dilday's other media interests; and she didn't know anything about QRW's proposed EEO program. Ms. Watkins has never been to Mableton she doesn't know where the proposed tower site would be located; she has never spoken to the proposed tower site's landlord; and she hasn't even spoken to QRW's consulting engineer. In sum, she generally displayed an overall ignorance of QRW's application and related documents.

155. It was one of QRW's limited partners, Porter Sanford, who personally opened QRW's checking account at Bank South in Atlanta (Tr. 4358-59). At that time only his name was on the signature card (Tr. 4360,5317). However, Ms. Watkins asserted that only her signature was on the Bank South account. She says that only a general parter can have their name on the bank account (Tr. 4669). However, Mr. Sanford has always and continues to receive Bank South QRW monthly statements at his office in Decatur, Georgia (Tr. 5220-5223).

156. Not only has QRW's purported general partner, Gloria Watkins, displayed an amazing lack of knowledge about QRW's application, what little tangible testimony she tried to give was evasive and misleading. A few examples will suffice.

157. Ms. Watkins claims that when she affirmatively certified to QRW's finances on July 18, 1987, she did so based on the Sun-Delta loan letter (see Finding 147 *supra*.). But she never received the Sun-Delta letter until the following day, July 19, 1987. So at the time she certified Mr. Watkins had no commitment from Sun Delta; she had prepared no financial plan (and still hasn't); and she hadn't seen a financial statement of any of her so-called limited partners. So she had absolutely no bases for representing that QRW had "sufficient net liquid assets on hand or available from committed sources to construct the station and operate it three months without revenue."

158. Gloria Watkins was also evasive and less than candid on the question of her capital calls. She initially admitted that she was supposed to pay her ten percent pro rata share of every capital call she issued (Tr. 4367). But it developed that all she had paid was her original $450 (Tr. 4372-73). She has no agreement with her partners

that would exempt her from capital calls (Tr. 4715). At first she said that she didn't know if her fellow partners knew she hadn't contributed her pro rata share (Tr. 4715). Later, she said that they were aware because she had disclosed it to them when the last call was made shortly before the hearing. She said that she explained to them at that time why she was behind, and that she would catch up as soon as she was gainfully employed (Tr. 4775-76).

159. It subsequently developed that not one of her fellow partners knew the status of Ms. Watkin's capital payments. Mr. Dilday denied knowing whether she was current (Tr. 5017-18); Flowers had never asked her but thought she was current (Tr. 5183); and Sanford thought that everyone was current (Tr. 5235-36).

160. *Intermediate Findings - QRW.* Based on the foregoing findings (Findings 144-159 *supra.*), QRW Limited Partnership will be awarded 0% quantitative integration. They've misrepresented their ownership structure to the Commission. The purported 10% general partner, Gloria Watkins, is not *bona fide* general partner at all. She is nothing more than a front for William Dilday. Ms. Watkins possesses neither the character nor the ability to carry out QRW's integration proposal. Not only is QRW's application flawed from an ownership standpoint, its financial structure is defective. From a comparative standpoint, QRW cannot be seriously considered.

161. *Hairston Broadcasting Limited Partnership.* Hairston is a Georgia limited partnership. It has one general and one limited partner. The sole general partners in Robin B. Hairston (Ms. Hairston) who holds 51% of the partnership's equity. Ms. Hairston, a black female, resides in strongsville, Ohio. The sale limited partner is United Communications, Inc., a Washington, D.C. Corporation.

162. The following chart sets out United's officers, directors and shareholders:[38]

CHART

Stockholders	% Shares Held	Officer	Director
Ernest N. Morial	14.286%	President	yes
Glenn Haydel	11.900%	Vice-President	yes
Gilbert Maddox	6.120%	Secretary/ Treasurer	yes
Walter E. Douglas	3.560%	Chairman of the Board	yes
James M. Freemont	14.286%		yes
Lawrence P. Doss	19.050%		yes
C. C. Haydel	7.140%		no
Paul L. Hubbard	3.560%		no
Burke Sythax	5.710%		no
Gregory Sythax	2.450%		no
Samuel Thomas	3.560%		no
Howard Sims	3.560%		no
Betty Hood	4.760%		no

163. Even *assuming* that Hairston was basically qualified (but see Findings 23-49 *supra.*). Some of their opponents argue that they should receive no integration credit. They contend that the general partner's (Robin Hairston's) past passive role in Hairston's affairs undermines any confidence the Commission might place upon her integration pledge.

164. While there is some merit to these arguments they will be rejected. There are some real questions about her ability to effectuate the partnership's integration proposal. For example, the record is clear that Robin Hairston cannot even meet her share of the expenses needed to prosecute the application without the considerable financial support of her husband, Carl (Big Daddy) Hairston. Without Big Daddy's funds, the general partner would be unable to meet her share of the pre-grant expenses. Moreover, there is a question whether Robin Hairston has the acumen to own and operate a broadcast station. The last two non-broadcast businesses she has owned and operated have turned up losers. At least that's what she told the Internal Revenue Service. Nevertheless, these doubts about Hairston's integration proposal will be resolved in their favor, and their claim for 100% quantitative integration credit will be honored.[39]

165. *Mableton Communications Limited*. MCL is a Georgia limited partnership made up of two partners. The sole general partner is Ralph Crossley. Crossley owns a 95% equity interest. The sole limited partner is Skywave Communications, Inc. Skywave owns the other 5% equity interest in MCL.

166. *Assuming* that MCL were basically qualified[40] they face no ownership structural deficiencies.[41]

DIVERSIFICATION OF MASS MEDIA

167. *Mableton Broadcasting Company*. Vanessa Gragg and Thomas L. Giglio have no media interests, other than their employment positions at WQXI-AM and FM, Atlanta, Georgia. Vanessa Gragg's jobs as receptionist, programming assistant, and research coordinator have all been non-management positions. Giglio is currently the Director of Engineering for WQXI-AM and FM, a management position. In MBC's application *neither* Gragg or Giglio pledged to divest themselves of their WQXI positions. Consequently they must be charged with their two broadcast positions (Tr. 107 and 115-117). The net result is that MBC suffers an average diversification demerit for Giglio's WQXI management position in the same market.

168. *Gonzales Broadcasting Corporation*. Neither GBC, Mr. Polk, nor Mrs. Polk have any interest in or connection with any other medium of mass communication.

169. *Bolton Broadcasting Limited*. With the exception of William McArthur, neither Ms. Bolton nor MFM have any interests in or connection with any medium of mass communications. William McArthur works part-time as a weekend disc jockey for WTAW, Atlanta, Georgia (Tr. 2538). He hasn't said he will resign from that position if Bolton is granted. But no diversification demerit attaches for this part-time, nonmanagement job.

170. *Radio Mableton Limited*. Ken Childs, a proposed integrated principal in RML, doesn't have any interest in or connection with any other medium of mass communications. However, Charlotte Timms, whom RML has proposed as an integrated 25% general partner (but see Findings 126-130 *supra*.), has other broadcast holdings. She has 33% ownership interest in WGAA (AM), Cedartown, Georgia; a 25% ownership interest in West Georgia Broadcasting, Inc., licensee of WLBB, Carrollton, Georgia; and she is currently general manager of WLBB. She *claims* she will sever all interests in or connection with these stations if RML's application is granted.[42]

171. Mitt S. Conerly, an RML limited partner, is President, a Director, and owns 100% of the voting stock of Broadcast South Inc., licensee of WGAA(AM), Cedartown, Georgia.

172. Leonard H. Carter, an RML limited partner, is President, a Director, and a 50% stockholder in West Georgia Broadcasting, Inc., licensee of WLBB, Carrollton, Georgia. He also owned non-voting, one-third stock interest in Broadcast South, Inc.

173. Because RML was out of the comparative running as early as the January 24, 1989 evidentiary admission session, their diversification was never subjected to the crucible of cross-examination. In fact, none of RML's general or limited partners were even called for cross-examination. Consequently, it is not possible to precisely determine whether RML should be assessed a diversification demerit or not, and if so, the severity of that demerit. At this point all we know, for sure is that three of RML's principals have substantial broadcast ownership interests in the state of Georgia.

174. *Metropolitan Management Corporation*. Neither MMC nor Randall A. Mangham have any interest in or connection with any other medium of mass communications.

175. *Lorenzo Jelks*. Jelks owns the *AUC Digest*, a weekly newspaper published in Atlanta. The newspaper has a circulation of 10,000, mainly students in the Atlanta University Center. It is a for-profit entity, selling advertising and showing a slight profit.[43] Jelks doesn't receive a salary from the *AUC Digest*, but he does receive expenses. He is the *Digest's* only employee. He says he will resign from the newspaper if his application is granted. Lorenzo Jelks has no other cognizable ownership interests in or association with any other media of mass communications.

176. So assuming that Jelks were basically qualified to be a Commission licensee (but see Findings 10-13 and 14-16 *supra*.), he would be assessed a comparative demerit under the diversification criterion.

177. *QRW Partners, Limited Partners*. Neither QRW nor Gloria Watkins (the alleged General Partner) have any mass media interests. However, William Dilday, another QRW principal does. The record shows that William Dilday is the dominant, and moving force behind the prosecution of QRW's application. It is Dilday who has organized, directed and principally funded QRW (Finding 144-160 *supra*.). So it is appropriate to weigh his other media interests under the diversification criterion.

178. His known cognizable interests include: (a) a 6% voting shareholder in the permittee for Channel 52, Albany, Georgia; (b) a 5% general partner in the permittee of Channel 16, Lubbock, Texas; and (c) a 33 1/3% partnership interest in an unbuilt LFTV station in Pittsburgh, Pennsylvania;[44] (d) a 5% partnership interest in Santa Barbara, California; (e) a 2.5% interest in Tulsa Broadcast Group, a television applicant for Tulsa, Oklahoma.

179. In addition, Mr. Dilday is (a) the receiver in bankruptcy for Stations WHGO(AM) and WJAM(FM), Marion, Alabama; (b) the receiver in bankruptcy for station WACR(FM), Columbus, Mississippi; and (c) a 1/3 general partner in Tequesta Television Partners Limited Partnership, an applicant for Channel 25, Tequesta, Florida.[45] He owns 10 shares of News Press and Gazette Company, the parent company of the licensee of WJTV, Jackson Mississippi and is the Executive Vice President and General Manager of that station.

180. His other media related interests include: (a) ownership of Kerimax Associates, a broadcast consulting firm (Tr. 5063); and (b) being a member of the Board of Directors of Sun Delta Capital Corporation, a Delta Capital Corporation, small business investment companies.

181. Based on Findings 177-180 *supra*., and *assuming* that QRW's ownership structure were *bona fide* (but see Findings 144-160 *supra*.), QRW will be assessed a significant comparative demerit under the diversification criterion.

182. *Hairston Broadcasting Limited Partnership*. Neither Hairston Broadcasting nor any of its owners have any mass media interests.

183. *Mableton Communications Limited*. Neither MCL nor Skywave have any attributable mass media interests. However, its 95% general partner, Ralph Crossley is the

General Sales Manager at WAOK/WVEE in Atlanta, Georgia. *See* FCC 89M-65 released January 9, 1989. For diversification analysis purposes he will continue in that position even if MCL's application is granted. *See* FCC 88M-4232, released December 9, 1988; and FCC 88M-4425, released December 29, 1988. So, *assuming* that MCL were basically qualified to be a Commission licensee (but see Findings 51-57 *supra*., and 58-67 *supra*.), they would be assessed a comparative demerit under the diversification criterion.

BEST PRACTICABLE SERVICE COMPARATIVE COVERAGE

184. The following chart shows the total areas and populations which each of the nine remaining applicants will cover within their respective 1 mV/m contours (Jt. Ex. 1, Table 14).

CHART

Applicant	Area (Sq. Km)	Population
Metropolitan Management (MMC)	1,824	955,444
Gonzales Broadcasting (GBC)	1,813	953,227
Lorenzo Jelks (Jelks)	1,794	922,890
Bolton Broadcasting (Bolton)	1,823	824,880
Mableton Broadcasting Company (MBC)	1,817	795,212
QRW Partners (QRW)	1,825	773,931
Radio Mableton Limited (RML)	1,819	752,607
Hairston Broadcasting (Hairston)	1,815	620,618
Mableton Communications, Ltd. (MCL)	1,831	541,697

185. All proposed service areas presently receive more than five full-time aural services. None of the applicants will provide service to any underserved areas.

186.The Commission awards a *slight* coverage preference when an applicant provides substantially greater coverage than its opponents, even where the additional service is to well-served areas. *See Simon Geller*, 90 FCC 2d 250, 276 (1982): 317,000 people; 737% advantage. For less significant differences in overall coverage, a *very slight* preference is warranted. *See Cotton Broadcasting Company*, 104 FCC 2d 473, 477 (Rev. Bd. 1986): 118,000 more people; 7.5 percent advantage.

187. Applying the analysis contained in Finding 186 *supra*., to the facts set out in Findings 184-185 *supra*., the following 3 intermediate facts are warranted:[46]

(1) MMC, GBC, and Jelks are entitled to a *very slight* coverage preference over Bolton, MBC, QRW, and RML;

(2) MMC, GBC, and Jelks are entitled to a *slight* coverage preference over Hairston and MCL; and

(3) Bolton, MBC, QRW, and RML are entitled to a *very slight* coverage preference over Hairston and MCL.

THE RF RADIATION COMPARISON

188. As previously pointed out, and as part of carrying out their environmental obligations, the Commission has called for a radio frequency radiation comparison under the standard comparative issue. *See* FCC 88M-3042 released September 16, 1988; FCC 88M-3587, released October 26, 1988; FCC 88M-4189, released December 7, 1988; and Findings 3 and 50 *supra*. And as the Hearing Designation Order makes clear the environmental comparison is between Hairston Broadcasting on the one hand, and the eight[47] remaining applicants on the other.

189. Of the nine remaining applicants *only* Hairston's proposal would exceed ANSI's (and the Commission's) radiation standards. Hairston proposes to mount its antenna on the existing tower of Station WAOS(AM), Austell, Georgia. WAOS's nominal power is 5.0 Kw (although the antenna input power is 2.35 Kw).

190. Hairston would place its antenna radiation center 85 meters above ground level (AGL) with an effective radiated power (ERP) of 3 Kw, circular polarization. To comply with OST Bulletin No. 65's requirement,[48] the bottom antenna bay location must be considered. Hairston's bottom bay antenna would be located 82 meters AGL. Since calculations are to be made at 2 meters AGL, the distance considered here is 80 meters.

191. Doug C. McConnell, Hairston's Technical Consultant calculates that:

(a) Hairston's antenna will contribute about 3.13% (worst case) of the total RF power density allowed under ANSI guidelines at 2 meters AGL at the base of the tower;

(b) At a point 6 meters horizontally from the base of the tower and 2 meters AGL, Hairston's antenna will contribute 3.11% of the RF power density allowed under ANSI's guidelines;

(c) At six meters from the closest point on the WAOS tower, WAOS will contribute 79.11% (using the nominal power of 5 kW) of the RF power density allowed under ANSI's guidelines; and

(d) The combined fields of WAOS and Hairston's proposal at 6 meters horizontally from the closest point on the WAOS tower and 2 meters AGL will be 82.22% of the allowable radiation from all sources.

192. Hairston would address its RF radiation emission problem by erecting a fence 6 meters from the closest point on the tower. This will prevent excessive exposure of the general public to RF radiation. By so locating the fence, says Mr. McConnell, the general public will not be exposed to RF radiation levels exceeding those recommended as safe by ANSI. *See* Findings 191(c) and (d) *supra* [49][50]

193. Hairston hasn't decided yet whether it will erect a circular of square fence. If it builds a circular fence the area encompassed within it will be approximately 113 square meters; if it builds a square fence, the area encom-

passed will be 144 square meters. However, Hairston hasn't even discussed the matter with the owners of the WAOS tower of the managers of that station.

194. Hairston asserts that it will not permit its workers inside the fenced area when WAOS is transmitting. But they've reach no agreement with WAOS owner which WAOS would turn off its transmitter when Hairston needed to get access to its transmitter. So if Hairston's employees need to get to the transmitter, they would have to wait until WAOS went off the air.

195. *RF Radiation Comparison: Intermediate Findings.* Based on Findings 188-194 *supra.*, certain intermediate facts are warranted. The other eight applicants are entitled to a *substantial* and *decisional* preference over Hairston under the comparative environmental criteria.[51] The other eight proposals will comply with ANSI's RF radiation standards, Hairston's will not. Hairston proposes a hazardous operation that poses a real threat to people's health. There is simply no need to license such a threat if there is a safe one available. And in this instance we have eight other safe ones available.

196. Hairston's proposal to build a fence has little to recommend it.[52] The construction of a fence wouldn't diminish the radiation one iota. Nor would it eliminate the contaminated area. The contamination will be in an area that would be occupied by people; i.e., Hairston and/or WAOS employees.

197. Hairston's opponents are correct. The proposal to erect a fence is too sketchy to be reliable. Hairston hasn't received permission from the landowner to do so, and doesn't even know what confirguation the fence will take. Moreover, Hairston hasn't even tried to work out a plausible plan with co-located WAOS on how each one's set of workers will be able to maintain their transmitters without exposing them to excessive RF radiation levels.[53]

INTEGRATION OF OWNERSHIP WITH MANAGEMENT

198. *Mableton Broadcasting Company.* MBC claims 100% quantitative integration. That claim was denied because of ownership structural deficiencies. *See* Findings 68-94 *supra* However, further quantitative and qualitative findings will be made.[54] MBC intends to integrate 51% stockholder, Vanessa Gragg, into the proposed station's day-to-day operations. Gragg, Chairman of the Board, Vice-President, Secretary, and Treasurer, will work full-time as the proposed station's general manager. In that capacity she will hire, fire, and promote station personnel. She will supervise all the employees, and will oversee the station's general administration.

199. Gragg, a black female, resides within the proposed station's service area. She has been involved in civic activities within that area. She is active in the PTA for Atlanta city schools, and back in 1981-1982 she served as a volunteer teaching art. She taught Sunday School in 1986-1987 on every other Sunday, and in March 1986, she served a term as secretary and director of Cascade Youth Organization.

200. For the past 12 years Vanessa Gragg has worked for WQXI(AM) and (FM), Atlanta, Georgia. She started as a part-time secretary and worked her way to Programming Assistant, and then to Research Coordinator. She is a full-time employee at WQXI and failed to timely pledge that she would resign her position if MBC is granted (Tr. 107). Consequently, her belated proposal to be the full-time manager at the proposed station must be evaluated in light of her full-time obligations to station WQXI.

201. MBC also proposes to integrate 49% stockholder, Thomas L. Giglio, into the proposed station's day-to-day operations. Giglio, MBC's President and a Director, will work full-time as the station's operations manager. In that capacity he will be responsible to the general manaer for supervising the station's programming, engineering and traffic/continuity functions.

202. Giglio, a white non-hispanic male, doesn't reside within the service area of the proposed station. But he promises to move to Mableton if MBC is granted. Giglio has no attributable record of civic activities.

203. Mr. Giglio has broadcast experience. Except for a brief six months active duty in the Army Reserve, he has worked for WQXI in Atlanta, Georgia since 1961. He began his career as a part-time transmitter operator; in 1964 he began working full-time at the station as engineer. He became Director of Engineering at stations WQXI(AM) and (FM) in 1986. While employed at WQXI, Mr. Giglio has been responsible for constructing two studio facilities and three transmitter plants. He was Project Manager when WQXI installed FM and TV antenna facilities atop the Peachtree Plaza Hotel in downtown Atlanta.

204. As noted (Finding 203 *supra.*), Thomas Giglio is a full-time employee at WQXI. He failed to timely pledge that he would resign his position if MBC is granted (Tr. 1167). Consequently, his belated proposal to work at least 40 hours a week as the proposed FM station manager must be evaluated against his full-time obligations to WQXI.

205. Both Ms. Gragg and Mr. Giglio were specifically instructed to declare their employment intentions in the Prehearing Order (FCC 88M-3042 released September 16, 1988). There at paragraph 3 and Footnote 3, binding guidelines were given each applicant on filling out their integration proposals. And they were told that "[i]f a principal intends to abandon present employment to become integrated he or she should specifically indicate that that is the case . . . "

206. Given their failure to timely commit to resignation of their WQXI positions, and assuming MBC's ownership structure wasn't deficient, Gragg and Giglio cannot be credited for their integration proposals. Holding two full-time positions in two FM stations in the same market is not reasonably possible, not to mention the conflict of interest problems inherent in holding dual positions for different masters.

207. *Gonzales Broadcasting Corp.* GBC claims 100% quantitative integration. That claim was denied because of ownership structural deficiencies (*See* Findings 95-116 *supra.*). However, further quantitative qualitative findings will be made (see Footnote 52 *supra.*).

208. GBI intends to integrate Sue G. Polk, its President, a Director, and 51% stockholder full-time (at least 40 hours a week) as general manager. In that capacity she will have overall supervisory responsibility for all aspects of the station's operations, including the EEO program.

209. Mrs. Polk, along with her husband Larry, have resided in Mableton, Georgia since June 1987, shortly before they filed their application. From 1963-1987 she

lived in Smyrna and Sandy Springs, Georgia. Both of those communities are also within the proposed station's service area.

210. She claims past broadcast experience although the quality of that experience is in dispute. In any event from June 1974 until October 1974 she was a sales representative for WYNX, her husband-to-be's station. In November 1976 (after they were married - see Finding 97 *supra.*), she returned as a sales representative and worked for WYNX until it was sold in May, 1985. She says she was full-time from November 1976 until May, 1985 except for a period of time that she had a bad back. During that period she only worked from 15-20 hours a week. But, as in the case of much of her testimony, she testified inconsistently about when she had a bad back. On direct she claimed she had a bad back for several months in 1977. But, on cross examination she said her back problem had persisted off and on for a couple years between 1976 and 1979.

211. Mrs. Polk handled WYNX's spot sales which meant she handled about 15 accounts a week. She claims she was promoted to sales manager in 1983. But again this was a disputed matter, and it appears that at most she only supervised one person (Tr. 1329-1333).

212. Sue G. Polk also claims civic participation. When her husband owned WYNX(AM), Smyrna, she was a member of the First Baptist Church of Smyrna (1977-1982); she was a lifeline volunteer (1982-1984); she was on the Board of Directors of the Marretta Christian Women's Club (1982-198); she was a member of the Calvary Children's Home (1980-1985); and she was affiliated with the Smyrna Division of Cobb Street Ministries (May 1985 to June 1987).

213. About a month to six months before they filed their Mableton application Mrs. Polk started to become active in Mableton civic activities. She has been active in: The Mableton Division of Cobb Street Ministries (from June, 1987); the South Cobb Division of the American Cancer Society (from January, 1987); the Mableton Business Association (from February, 1987); and the South Cobb Arts Alliance (from March 1987). Mrs. Polk is not involved in any Mableton civic activity that doesn't include Mr. Polk (Tr. 1411, 1413-1416, 1422).

214. Sue G. Polk also claims an integration preference for being both a female and a minority. She claims to be of Hispanic descent through her father. Her claim to being an Hispanic will not be credited.

215. She was born Sue Beverly Gibson on July 7, 1931. Her birth certificate doesn't indicate that she is Hispanic. In 1975 when she married Larry Polk she became Sue Gibson Polk. She was perfectly happy being Sue Gibson Polk until 1985 when she and her husband learned that there were radio frequencies available in Rockledge, Florida, and in Mableton, and Roswell, Georgia. And when she learned that she could be given a minority hearing preference, she decided to reclaim her heritage (RML Ex. 26; Tr. 1288-1365-66, 1679, and 1769).

216. In April 1986, she applied to have her name changed from Sue Gibson Polk to Sue Gonzales Polk. This uncontested application was granted, and the name change became official in October 1986.

217. Other than her driver's license, Mrs. Polk has no official documents establishing that she is Hispanic or that she uses the name Gonzales. She has never signed Sue Gonzales Polk on any papers in the various civic activities in which she is involved, and no public documents or newspapers have referred to her as Sue Gonzales Polk.

218. Mrs. Polk usually uses the name Sue G. Polk. Although her maiden name was Gibson, she says she went by the name Sue B. Polk prior to the name change. That statement is totally false. Her cosmetology license bears the name Sue G. Polk, and that has been the name on her license since she married Mr. Polk in 1975.

219. She doesn't speak Spanish; she isn't a member of any Hispanic organization; and she has done nothing other than changing her name to reflect her Hispanic heritage. When asked why she didn't claim her heritage between 1931 and 1986, she said it was because her mother didn't want her to do it; i.e., it would have signified that she was illegitimate (Tr. 1749). But her mother died in 1971. She also said she delayed the change in names because her children didn't know of her illegitimacy and she didn't want to tell them until they were ready. When she started the name changing process in 1986, her children were 32 and 35 years old.

220. Based on the foregoing (Findings 214-219 *supra.*) Sue G. Polk should be accorded *female* status but not *minority* status.

221. GBC also proposes to integrate Lawrence N. Polk, its Vice-President, Secretary, Director, and 49% stockholder, into the proposed station's day-to-day operation as full-time sales and programming manager. In that capacity he will be responsible for the local and national sales effort.

222. He has resided in Mableton, Georgia since June 1987 (Finding 209). From 1964-1987, he lived in Smyrna and Sandy Springs, Georgia. Both of those communities are also within the proposed FM station's service area.

223. Mr. Polk has past broadcast experience. In 1964-1965 he was a salesman and announcer for WAIA(AM), Hopeville, Georgia. From 1966 to 1985, Polk was President, Director, 100% voting stock owner, and General Manager of Station WYNA(AM), Smyrna, Georgia. Since 1985, Mr. Polk has been the owner of Polk Realty, located in Mableton. He devotes about 3 hours a week to his real estate business and will continue to do so if GBC's application is granted.

224. Lawrence Polk also claims credit for civic participation. Before he sold WYNX, Smyrna in 1985, he was civically active in the Smyrna area. He was on the Smyrna Hospital Civic Advisory Board (1980-1982); he was a member of the Smyrna-Cumberland Rotary Club (1978-1984); he was a member of the Cobb County Citizens for Better Government (1982-1985); and he was a member of the Smyrna First Baptist Church (1980-1984).

225. About a month to six months before they filed their Mableton application, Mr. Polk started to become active in Mableton civic activities. Those activities included: The American Cancer Society (from January, 1987); the South Cobb Art Alliance (from March, 1987); and the Mableton Business Association (from February, 1987).

226. Lawrence Polk is a white, non-Hispanic male.

227. *Bolton Broadcasting Ltd.* BBL proposes to integrate their sole general partner and 20% equity owner, Janet Bolton into the proposed station's day-to-day operations. She will work full-time at least 40 hours per week as general manager. In that capacity, Ms. Bolton will direct the overall operations; she will set the financial, admin-

istrative, and employment policies; she will hire and fire the employees; she will administer and implement the station's EEO program; she will oversee the station's public relations and community outreach efforts. After grant, but before broadcast operations commence, she will oversee the station's construction. She will have full control of the station's funds and is confident that she can so manage the station.

228. Janet Bolton, born September 29, 1944 in Atlanta, Georgia, graduated from Paine College, Augusta, Georgia in 1968 with a BA in English. In 1977 she received a Masters of Education from the University of South Carolina, Columbia. The Fulton County Board of Education currently employ her as an English teacher at Riverwood High School, Atlanta. She has taught for 20 years and has taught courses in drama and mass media (Bolton Ex. 1, p. 1; Tr. 2055, 2501, 2519-2520 and 2755). Although Ms. Bolton is presently a professional educator, she will terminate her present employment if BBL is granted. She will have no other employment other than managing the proposed station.

229. From her birth in 1944 until 1966, Ms. Bolton lived in Atlanta, except for the years 1958-1962. Again from 1978-1981 she lived in Atlanta within the 1 mV/m contour of the proposed Mableton station. In July, 1981, she moved to 392-6 Westwood Place, Austell, Georgia. She resides outside of Austell's corporate limits, and adjacent to Mableton. Actually her address is considered an actual part of the Mableton community and is within the station's proposed 1 mV/m contour.

230. Janet Bolton has no past broadcast experience, but as previously noted (Finding 227 *supra*) she is confident that she can translate her educational talents into managerial skills, and can implement BBL's Black-oriented format (Tr. 2356).

231. Ms. Bolton claims local civic participation. She is a member of the Holsey Temple C.M.E. Church in Atlanta; she is also a choir member and a past member of the Usher Board. She is a member of the Riverwood High School PTA, and a member of The Paine College Alumni Association, Atlanta Area Chapter.

232. Janet Bolton claims integration enhancement for being both a Black and a female.

233. *Radio Mableton Limited*. RML has presented a flawed direct case, and thus is being awarded 0% integration. *See* Findings 126-130. Nevertheless, certain limited findings can be made on one of RML's proposed integrated principals (see Footnote 52 *supra*.).

234. RML intends to integrate one of its general partners, Ken Childs, full-time into proposed day-to-day operation. Although he hasn't specified a management position, he says he'll work 40 hours or more a week supervising the station's personnel; he will be in charge of programming and newscasting; and he'll oversee community affairs. Childs presently owns Sunbelt Sales, a company that distributes paper and chemical materials. He has worked full-time for Sunbelt since 1984. He also owns rental property, and is a 25% owner of a laundromat. Although he was specifically instructed to declare his employment intentions in the Prehearing Order (see Finding 205 *supra*.), there is no evidence that Childs will resign his full-time position if RML were granted.

235. Ken Childs currently resides in Carrollton, Georgia. There is no evidence that his residence is within the 1 mV/m contour of the proposed station, nor any commitment that he will relocate to Mableton. Moreover, all of Childs' civic activities are Carrollton related. So no credit can accrue for those activities. So such integration evidence as RML was able to submit strengthens the findings that no integration credit can be awarded it.

236 *Metropolitan Management Corporation*. MMC has been awarded 0% quantitative integration credit because (1) they have misrepresented their ownership structure; (2) they've tried to hide those misrepresentations by stone-walling their opponent's discovery efforts; and (3) they've really made no serious effort to prosecute their application. In brief, MMC has all the indicia of an applicant waiting around for a pay-off (see Findings 131-142 *supra*.). Nevertheless, certain limited additional comparative findings will be made (see Footnote 52 *supra*.).

237. MMC originally proposed to integrate its President and 100% stockholder, Randal A. Mangham, into the proposed station's day-to-day management. MMC said that Mangham would serve full-time, a minimum of 40 hours a week, as the General Manger of the station. In that capacity he would have overseen all aspects of the station's operations, handled all the station's financial affairs, and hired and fired all stations personnel. Mangham is presently a practicing attorney, but says he'll dissolve his practice if MMC is granted. He has also been an associate minister at the Beulah Baptist Church in Atlanta for the past four years.

238. Mangham currently lives in Atlanta, but will move to Mableton if MMC is granted. He claims past broadcast experience. From 1974-1975, he was an administrative intern with WHUR-FM; he was on the Board of Directors of Howard University, licensee of WHUR-FM from 1978-180. While on the Board he sat on a special subcommittee that oversaw WHUR's operations.

239. Mr. Mangham also claims credit for civic activities. he has been co-director of Capital Home Ministries. Between five and ten years ago he joined the NAACP and is now a life-time member. He has been a member of the concerned Black clergy for the past two years, and a members of the Gate City Bar Association for the past seven years. In 1986, Mangham served on a program for poor people "Thanksgiving and Christmas Feed The Hungry."

240. Randall Mangham seeks comparative enhancement for being a Black male.

241. *Lorenzo Jelks*. Lorenzo Jelks has been disqualified on two basic issues. (*See* Findings 10-13, and 14-16 *supra*.). However, the following comparative findings would apply to his application (see Footnote 56).

242. Lorenzo Jelks, sole owner, will integrate himself into the proposed station's day-to-day operations as General Manager. He'll work full- time (at least 40 hours a week). As General Manager he'll establish all station policies, make all the personnel decisions, obtain financing for the station,[55] and supervise the station's finances, supervise the station's day-to-day operation, and supervise and direct all station employees.

243. Lorenzo Jelks has lived in Atlanta from 1955-1961 and from 1965 to the present. He does not propose to move to Mableton if his application is granted. He claims past broadcast experience. In 1962, he was a staff announcer at Station WHBI(FM), Newark, New Jersey. From 1965-1967 he worked at WIGO(AM), Atlanta. There he produced and announced news and public af-

fairs programs. He became a newscaster at WSB-TV, Atlanta in 1967, and was a general assignment reporter for that station for five and one-half years. He also operated a carrier-current radio station at Atlanta University Center for ten years.

244. Jelks has been civically active in the Atlanta area. He has been a member and supporter of the Butler Street YMCA in Atlanta. But it appears that that was back in 1972. In 1986 he was an unsuccessful candidate for Georgia state senator from the 39th District. He is also a member of the Atlanta Chapters of the NAACP and the Urban League.

245. Lorenzo Jelks seeks comparative enhancement for being a Black male.

246. *QRW, Partners, Limited Partnership*. QRW has been denied any integration credit for any one of three reasons (see Findings 144-160 *supra*.). They have misrepresented their ownership structure to the Commission. Their sole general partner, Gloria Watkins doesn't possess either the character or the ability to carry out QRW's integration proposal. And their financial structure is fatally flawed. Nevertheless, additional comparative findings will be made (see Footnote 52 *supra*.).

247. QRW would integrate its sole general partner, Gloria Watkins, into the station's proposed day-to-day operations as their full-time general manager. In that capacity she will supervise all management employees, and will make all the day-to-day major decisions. She will resign from her present position if QRW is awarded the grant.

248. Mr. Watkins currently resides in Jackson, Mississippi. She never resided within the Mableton proposed service area, and never even visited Mableton. Her proposal to move to Mableton if QRW is awarded the grant was rejected because it varied with her integration statement (Tr. 290).

249. Ms. Watkins' broadcast and business experience dates back to 1972 when she became a Secretary to the Public Affairs Director at WLBT(TV) in Jackson. From 1975 to 1978 she became WLVT's public affairs director, and in 1978, became its promotion manager. She served in that position until 1980.

250. From July 1982 to September 1983 Ms. Watkins was operations manager of Station WLBM, Meridian, Mississippi, a WLBT satellite station. Then from September 1983 until 1984 she returned to WLBT as Program Director. Then she left to become an account executive with the Jackson Conventions and Visitor's Center. She served as promotions director of the Center from March 1987 to September 1988. Then she became a free-lance public relations consultant. At the time of the hearing she was working for the state of Mississippi administering federal and state programs.

251. Gloria Watkins can make no claim for civic participation. but she does seek comparative enhancement for being a Black female.

252. *Hairston Broadcasting Limited Partnership*. HBLP has failed to show that its basically qualified on two counts. They have falsely certified their financial qualifications. And they have failed to show that their purported lender, Atlantic Coast Equities, had sufficient net liquid assets to fund the proposed loan to Hairston that Hairston was relying on (see Findings 23-49 *supra*.). In addition, and even *assuming* that Hairston were basically qualified, they would receive a decisionally significant demerit under the RF Radiation Comparison (Findings 188-197 *supra*.). Nevertheless, further comparative findings will be made (see Footnote 52 *supra*.).

253. HBLP proposes to integrate its sole general partner, Robin Hairston, into its day-to-day operations. Ms. Hairston ostensibly holds 51% of the partnership's equity.[56] She claims she will devote 40 or more hours a week to being the proposed station's general manager. She also says that she will disengage herself from all her current obligations to fulfill this commitment. As general manager Ms. Hairston will supervise all facets of the station's management and operation. All personnel involved in the station's management and in the partnership's other affairs would report to her.

254. Ms. Hairston received a Bachelor of Arts degree from the University of Maryland in 1976. She currently resides in Strongville, Ohio, but will move to Mableton if HBLP is granted. She resided in the Atlanta area; i.e., in Roswell, Georgia between May and November 1987. That is the only time she has resided in the Atlanta area.

255. Robin Hairston's business and broadcast experience is sketchy at best. From 1984 to 1986, she owned and managed a beauty salon in Virginia Beach. In 1986, she started a retail specialty shoe store which she owned and managed until 19871. Both businesses closed in 1987. She lost $15,000 on the beauty salon and $111,150 on the shoe store (Hairston Ex. 3, pp. 2-3; Tr. 6451-6452).

256. She claims past broadcast experience on the strength of having observed and participated in the operations of WPCE(AM)/WOWI(FM) in Norfolk, Virginia between November, 1986 and November, 1987. That is the time period she advertised her business with those stations; i.e., "I bought advertising time along with watching some of the -- you know, day-to-day operations of the stations: (Tr. 5265). She went to the stations on sixty different occasions, and observed their operations in some instances for as long as an hour and half (Tr. 5266). She was never a paid station employee.

257. Mr. Hairston has also put in a claim of sorts for local civic activity. During the period between May 10 1987 and November 1987 when she resided in Roswell, she was a member of the local PTA. She also claims to have managed "Defense Against Drugs," an Atlanta-based organization from 1986 to 1987. She says her job was to schedule professional football players to give anti-drug appearances in the Mableton area. However, it developed that the only football player she ever scheduled was her husband, Carl Hairston. And although Carl Hairston appeared in Atlanta, he never made any appearances in Mableton.

258. Robin Hairston claims comparative enhancement for being a Black female.

259. *Mableton Communications Limited*. MCL had failed to show that it is basically qualified on two grounds. They admit that they don't have a transmitter site (Findings 51-57 *supra*.) and they have lacked candor about the availability of their proposed transmitter/tower site (Findings 58-67 *supra*.). Nevertheless, further comparative findings will be made. (see Footnote 52 *supra*.).

260. MCL claims 100% quantitative integration. They propose to integrate their partner and 95% equity holder Ralph Crossley into the proposed station's day-to-day operation. Crossley would be the full-time (at least 40 hours

a week) general manager, but she says he will be spending at least sixty hours a week for the foreseeable future if MCL is granted.

261. As general manager Crossley will have complete control of the station's day-to-day operation. He will establish station policies, hire and fire the station's staff, oversee the station's finances, and represent the station in the community.

262. Ralph Crossley currently is general sales manager of Stations WAOK and WVEE, Atlanta. He works about 60 to 70 hours per week in that position. For *integration* purposes *both* Crossley's existing position and his proposed general managership will be considered (see FCC 88M-4232, released December 8, 1988). Thus, Crossley is proposing a work-week of 100 to 130 hours. Such an integration proposal cannot be effectuated. So even if MCL were bascially qualified, it would still be awarded 0% quantitative integration credit.

263. Crossley lives in Atlanta, Georgia, within the proposed primary service of MCL's proposed station. He has lived there since 1979. He doesn't propose to move to Mableton.

264. Ralph Crossley has broadcast experience. In June 1978 he joined WXYZ, Detroit, Michigan as an account executive. In June 1979, he moved to Atlanta to join WAOK/WVEE. He as an account executive with them until 1984 when he became a Senior Account Executive. In May, 1986, he became Assistant Local Sales Manager and in January 1987, Assistant Sales Manager. He became General Sales Manager in November 1988.

265. Ralph Crossley has local civic participation. Since 1984 he has been active in the Atlanta Media Network, an organization of Black advertising professionals. He has been a dues paying member of the Atlanta NAACP for eight of the last ten years. He belongs to a local community association, the Niskey Lake Association. He has worked raising funds for the Martin Luther King Center, the Sickle-Cell Foundation and in 1983 he established a program of summer internships for students at broadcast stations.

266. Ralph Crossley claims comparative enhancement for being a Black male.

AUXILIARY POWER

267. All applicants propose to install auxiliary power facilities. However, a brief comment on Hairston Broadcasting Limited Partnership's auxiliary power proposal is warranted. Robin Hairston didn't opt for auxiliary power until December 9, 1988, the day she signed her hearing testimony. However, she has never obtained a cost estimate for the necessary equipment, and she doesn't know that type of equipment is used for auxiliary power.

ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Nine applicants[57] remain in the battle for Channel 273A in Mableton, Georgia: (1) Mableton Broadcasting, Inc. (MBC); (2) Gonzales Broadcasting, Inc. (Gonzales, GBI or GBC); (3) Bolton Broadcasting Limited (Bolton or BBL); (4) Radio Mableton Limited (RML); (5) Metropolitan Management Corporation (Metropolitan or MMC); (6) Lorenzo Jelks (Jelks); (7) QRW Partners, Limited Partnership (QRW); (8) Hairston Broadcasting Limited Partnership (Hairston or HBLP); and (9) Mableton Communications Limited (MCL).

2. The parties adduced evidence on eight factual issues. Seven of those issues were basic qualifying issues, and the eighth was the standard comparative issue. Of the seven basic qualifying issues, two are against Lorenzo Jelks (Jelks 1 and 2); three are against HBLP (Hairston 1, 2 and 3);[58] and two against Mableton Communications Limited (MCL 1 and 2).

3. *The Procedural Background*. Anyone who studies this voluminous evidentiary record will soon discover that from both an academic and public interest standpoint this wasn't a well-tried case. On a scale of 0 to 10 (10 being a well tried case), this one rates about a 4. Now it wasn't that we lacked skilled attornies. We had a roomful of talent. Rather it was the way these advocates *elected* to try their case.[59] Certain of these elections must be described. Otherwise the reader will not recognize the *theme* that underlies many of the rulings that were made during the course of these proceedings.

4. First, either by tacit or express agreement, these applicants idled their way through discovery. Although they were accorded full discovery privileges, and although there were at least five limited partnerships involved, few (if any) limited partners were deposed on the comparative aspects of the case. And even many of the general partners were deposed once-over-lightly.[60] While the parties agreed on a joint document production, the production was honored more in its breach than in its observance.

5. Consequently, what should have been a hearing of reasonable length (it can never be a *short* record when there are eleven or twelve applicants still in the case) turned out to be an all-too-lengthy record that was *part-hearing* and *part - discovery*, the discovery they should have taken in the first place.[61]

6. Moreover, because of breach of observance of the document production, there were relevant documents being requested through the hearing,[62] and even today certain applicants have never made requested documents available.[63] And because the hearing turned out to be little more than a series of belated discovery sessions, the Presiding Officer found himself flooded with *posthearing* enlargement requests. *See* FCC 89M-1096 released April 6, 1989; FCC 89M-1380 released May 9, 1989; FCC 89M-1400 released May 10, 1989; FCC 89M-1401, released May 10, 1989; FCC 89M-1457, released May 15, 1989; FCC 89M-1461, released May 16, 1989; FCC 89M-1465 released May 16, 1989; and FCC 89M-1498 released May 19, 1989. That is no way to try a comparative hearing.

7. Another matter. In this case we had an abnormally high number of applicants who failed to devote enough time, money and attention to the preparation of their direct cases. Now in large multi-party cases you always get an applicant or two who waits until the last minute to decide to apply for the frequency, and then tries to throw everything together, usually with disastrous results. And you always get an applicant who decided early enough to apply for the frequency, but who frittered away the intervening preparation time. Stated another way, in these comparative cases there's always one or two applicants that never get the word. But in this case we have more than one or two. We have more than our share of applicants who filed at will, and so now can repent at leisure.[64]

THE BASIC QUALIFYING ISSUES

8. Before we turn to the standard comparative issue we must first consider the basic qualifying issues against Jelks, HBLP, and MCL. For it is axiomatic that only basically qualified applicants are entitled to a comparative analysis. *See e.g. Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960) *affirmed sub. nom. Guinan* v. *Federal Communications Commission*, 297 F. 2d 782, 22 RR 2026 (1961).

9. *Lorenzo Jelks*. Jelks faced two basic qualifying issues, a financial qualifications issue, and a financial misrepresentation issue (Jelks -1 and Jelks-2). He could satisfy neither. When he filed his application on July 10, 1987, Jelks admitted that he wasn't financially qualified. He admitted tha the didn't have sufficient net liquid assets on hand or from committed sources to construct and operate the proposed facility for three months without revenue. He has never amended his application to state otherwise. So Jelks is not financially qualified, and his application must be denied. *See* Findings 10-13 *supra*.

10. Even *assuming* that Jelks were financially qualified, his application would still be denied under Jelks-2. When he filed his application on July 10, 1987, Jelks admitted that the wasn't financially qualified but he rerepresented that he would " . . . file a financial amendment in the near future." He never did. Over a year later (when the case was designated for hearing on December 8, 1988), he still hadn't. He still hasn't. The record clearly shows that Jelks did not make this representation in good faith. The misrepresentation that Lorenzo Jelks made under Jelks-2 leads independently to the conclusion that he is not fit to be a Commission licensee, and mandates denial of his application. *See* Findings 14-16 *supra*.

11. Since Lorenzo Jelks is disqualified for either of two reasons, his application will not be considered any further.[65]

12. *Hairston Broadcasting Limited Partnership*. HBLP faced three basic qualifying issues: a financial issue (Hairston-1); a false financial certification issue (Hairston-2); and a financial mispresentation issue (Hairston-3).

13. HBLP has shown itself to be financially qualified. The financial issue (Hairston), unlike Hairston-2 *infra*., and Hairston-3 *infra*., looks forward. Stated another way, under Hairston 2 and 3, we must analyze the financial documents available to HBLP as of September 1, 1987, when they certified they were financially qualified. Under Hairston-1 we can look at financial data developed after that date.

14. HBLP needs $317,300 to prosecute their application and construct and operate their proposed station for three months without revenue. The record shows that they have at least $349,000 to meet that $317,000 commitment. That leaves a cushion of $31,300. So it is concluded tht HBLP is financially, and Hairston-1 forms no impediment to a grant of their application. *See* Findings 17-22 *supra*.

15. Under Hairston Issues 2-3 we must decide whether HBLP misrepresented or lacked candor when they affirmatively certified their financial qualifications in BPH-870710NO. Unlike Hairston-1 *supra*., here we must look at the documents that were in existence on August 31, 1987, when Robin Hairston certified that HBLP was financially qualified.

16. Hairston 2-3 will be resolved adversely to HBLP for any one of several reasons. In the first place HBLP bears the burden of proof on those two issues, and they have failed that burden under either issue. They have failed to show that Robin Hairston truthfully certified HBLP's financial qualifications on August 29, 1987. They have also failed to demonstrate that Hairston's purported lender, Atlantic Coast Equities, had sufficient net liquid assets on September 1, 1987, to fund the proposed loan to the partnership. Indeed, the record evidence shows the converse to be true. *See* Findings 23-49 *supra*.

17. When Robin Hairston certified, on August 29, 1987, that HBLP had sufficient net liquid assets on hand or from committed sources, she had absolutely no basis for doing so. She had no financial documents whatsoever. She didn't even have the worthless September 1, 1987 loan letter from Atlantic Coast Equities in her possession.

18. At the time she certified Ms. Hairston knew that Atlantic Coast Equities was owned by her friend and sometimes financial advisor, Philip Wainwright. So she knew that Atlantic Coast was not a bank or anything like a bank. Moreover, she knew, or should have known that Atlantic Coast (Wainwright) had no intention of lending money to the partnership or indeed had no money to lend. In fact, Wainwright was "very careful" not to use language that would give Ms. Hairston the impression that Atlantic Coast would lend her the $300,000 involved. State another way HBLP's so-called September 1, 1987 loan commitment letter was not only a sham, it wasn't even a decent accommodation letter. So even if Robin Hairston had had Wainwright's September 1, 1987 letter before her when she certified, she would have known that he gave her no assurance that the net liquid assets were on hand or available from committed sources.

19. Robin Hairston was well aware tha she had falsely certified the partnership's finances. Her hearing testimony about the subject demonstrates that (Findings 26-29 *supra*.). In a last-ditch effort to cover up her misrepresentation, she contradicted herself; she was evasive and less than candid;[66] she dissembled. Such conduct does not befit a prospective broadcast licensee. So under both issues 2 and 3, the conclusion is warranted that HBLP lacks the necessary character qualifications to be a Commission license, and their application will be denied.

20. Since HBLP is disqualified under either Hairston-2 or Hairston-3, their application will not be considered any further. [67]

21. *Mableton Communications Limited*. MCL faced two basic qualifying issues, a site availability issue (MCL-17), and a false site certification issue (MCL-2). They failed to meet either issue. On MCL-1, they admit that they don't have a transmitter site available. Accordingly, they're not basically qualified to be a Commission licensee. *See* Findings 51-57 *supra*.

22. MCL-2 (the false site certification issue) must also be decided adversely to MCL. An experienced broadcaster (Finding 264) Ralph Crossley knew or should have known that he couldn't rely on the hearsay representations of a veritable stranger, Lee Perkinson, to certify his transmitter site. He had never met Perkinson, and he had no written documents to substantiate that his site was available. Moreover, at the time he certified Crossley was aware that he could be facing transmitter site problems, and that he might have to amend to another site. His engineering consultant, Richard Biby, had told him that. So he had every reason to believe thqt his transmitter site (the Marler property) was not available. But Ralph Crossley went ahead and certified that he was reasonably assured that that site was available. It is therefore concluded that Ralph Crossley's July 10, 1987 transmitter site

certification is false, that Crossley had every reasons to believe it was false when he made it, and that MCL doesn't possess the requisite character qualifications to be a Commission licensee (Findings 58-67 *supra).*

23. Since MCL is disqualified under either MCL-1 or MCL-2, their application will not be considered further.[68]

THE STANDARD COMPARATIVE ISSUE

24. With the elimination of Jelks, Hairston, and MCL, six applicants remain for comparative consideration:" (1) MBC; (2) Gonzales; (3) BBL; (4) RML; (5) MMC; and (6) QRW. These six will be analyzed under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearing*, 1 FCC 2d 395 as modified by subsequent Review Board and Commission decisions.

25. We will orient our analysis toward the Commission's two primary comparative objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

26. *Diversification of Mass Media*. Turning to the first primary objective, three of the applicants: Gonzales, BBL, and MMC will offer of a diffusion of control of mass communications. They are clean from a diversification standpoint, and will not be assessed any comparative demerit (see Findings 168, 169, and 174 *supra).* They will be awarded: a *decisionally significant* preference over QRW who has been charged with the myriad media holdings of William Dilday (Findings 177-182); a *clear (but not decisional)* preference over MBC who is charged with Thomas L. Giglio's management position in the same market (Finding 167 *supra.*); and probably a *substantial* diversification preference over RML since three of RML's four principals have broadcast interests in the State of Georgia (Findings 170-173 *supra.*).

27. As between QRW, MBC, and RML, MBC is entitled to a clear preference over RML, and a significant preference over QRW. RML is entitled to a clear preference over RML. So for all practicable purposes QRW is out of the comparative running, and RML and MBC are trailing badly comparatively.

28. *Best Practicable Service*. In deciding which of the six will offer the best practicable service to the public we may need to consider as many as four criterion:[69] (1) whether any applicant or applicants should be preferred because of a superior areas and populations proposal (comparative coverage); (2) the degree each will integrate their ownership into their proposed station's day-to-day management (quantitative integration); (3) the qualities each integrated owner will bring to that day-to-day management (qualitative integration); and (4) whether the degree of quantitative and qualitative integration is further enhanced by minority and/or female ownership.

29. Under the third criterion (qualitative integration) we would consider such factors as local residence, a participation in civic affairs within the proposed service area, past education and business experience, and past broadcast experience.

30. *Criterion 1 - Comparative Coverage*. No decisional or even substantial preference will be awarded under this criterion (see Findings 184-187 *supra.*). MMC and GBC are entitled to a *very slight preference* over BBL, MBC, QRW, and RML. So unless two or more applicants were to finish in a virtual dead heat comparatively, this criterion will play no role in the out come of this decision.

31. *Criterion 2 - Quantitative Integration*. The following charge depicts the amount of quantitative integration claimed, the amount awarded, and the Findings which support that award.

CHART

Applicant	Claim	Awarded	Findings	References
MBC	100%	0%	F 68- 94	198-206
GBC	100%	0%	F 95-116	
BBL	100%	100%	F117-124	
RML	100%	0%	F126-130;	233-235
MMC	100%	0%	F131-142	
QRW	100%	0%	F144-160	

32. When the ultimate findings on the diversification of mass media criterion (Conclusions 26-27 *supra.*) are evaluated along with the ultimate findings on the quantitative integration criterion (Conclusion 31 *supra.*), the following preliminary conclusions are warranted:

(a) MBC, RML, and QRW are eliminated from any further consideration. They all have diversification demerits, and they have been awarded 0% quantitative integration. Thus they can meet neither of the Commission's two primary objectives (see Conclusion 25 *supra);* and

(b) as between GBC, BBL and MMC, BBL (Bolton is the easy winner. Neither GBC (Gonzales) nor MMC (Metropolitan) could sustain their claim to 100% quantitative integration. Only BBL (Bolton) made their 100% quantitative integration claim stand up.

33. GBC has been awarded 0% quantitative integration. Its ownership structure is a classic sham. Sue G. Polk, GBC's purported 51% owner, and president, has neither ability nor the experience to own and operate an FM station in a major market. Her hearing testimony was befuddled and confused. The most charitable evaluation that can be given that testimony is that it was a long series of misstatements. There simply is no way that Gonzales, if it relies on Ms. Polk as it represents it well, could offer the best practicable service to the public.

34. MMC has been awarded 0% quantitative integration. They misrepresented their ownership structure to the Commission in their application. Then they tried to conceal those misrepresentation by stone-walling discovery; i.e., they simply refused to make relevant documents to their opponents. To this very day, they've refused to produce documents they claim existed at the time they filed their application. In addition, it is clear that from the outset MMC simply wouldn't put much time, money, or effort into prosecuting its application. So there is no way to conclude that MMC could offer the best practicable service to the public.

35. BBL has been awarded 100% quantitative integration. The record demonstrates that they are a *bona fide* limited partnership. The limited partners are truly passive investors. They have not impremissibly involved them-

selves into the partnership's affairs. *See KIST Corp.*, 58 RR 2d 1483 at 1485; *Louisiana Super Communications Ltd. Partnership*, 59 RR 2d 761 (Rev. Bd. 1985); and *Susan B. Mulky*, FCC 89-217, released July 13, 1989.

36. BBL's general partner, Janet Bolton, is legally and actually in control of the partnership. She owns 20% of the partnership's equity. She's a college-educated professional with 20 years of work experience. The record shows that she is both capable and willing to manage an FM station in a major market. She has an understanding of the BBL application and the partnership agreement. She also understands her duties and responsibilities as a general partner and as full-time manager of the proposed station. Stated another way, Janet Bolton passed her "trial by endurance" with flying colors. *See* FCC 89M-1498 released May 19, 1989. BBL has earned the 100% quantitative integration it claims.

ULTIMATE CONCLUSIONS

37. Under the ultimate conclusions we must determine which application should be granted. It's no contest. BBL's application is by far superior to GBC's and MMC's. BBL is clear from a diversification standpoint, and they made their 100% quantitative integration claim stand. That puts them decisively ahead of GBC and MMC who are entitled to no quantitative integration credit whatsoever.

38. So we needn't evaluate criteria 3 and 4 under the best practicable service objective; i.e., qualitative integration and female and/or minority enhancements. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93FCC 2d 643 (R. Bd. 1983) at 649.[70] Bolton Broadcasting Limited is declared the winner of this comparative marathon.

39. Even though criteria 3 and 4 aren't being considered this doesn't mean that BBL is deficient under those standards. BBL's general partner, Janet Bolton, is a Black female who can claim both local residence, and civic participation. *See* Findings 228-232.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Bolton Broadcasting Limited's application (BPH-870710MD) IS GRANTED; and

The applications of Mableton Broadcasting Company, Inc. (BPH-870706ML), Gonzales Broadcasting Inc. (BPH-870707MJ), Voth Broadcasting Company (BPH-870710MF), Radio Mableton Limited (BPH-87-710MT), Metropolitan Management Corporation (BPH-870710MY), Lorenzo Jelks (BPH-870710MZ), QRW Partners Limited Partnership (BPH-870710NF), Hairston Broadcasting Limited Partnership (BPH-870710NO), and Mableton Communications Limited (BPH-870710NQ) ARE DENIED.[71]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] But see the Preliminary Ruling *infra.*, where Voth's application is dismissed for failure to prosecute.

[2] The Mass Media Bureau's findings were limited to the comparative coverage issue. *See* paragraph 3 *supra*.

[3] More and more we are getting applicants in cases that have absolutely no *realistic* chance of prevailing. *See e.g. Ronald Sorenson*, FCC 89D-40, released September 22, 1989. There two of the applicants, Asterisk and Clear Channel each had decisive diversification demerits against them, and were claiming no integration of ownership with management. Their chances of winning that six-applicant proceeding were slim to nil. Yet they burdened the Commission's processes by remaining in the case. The cynic would say such type applicants were waiting for a pay-off. But even assuming these applicants have the best of motives, why should they be permitted to burden the Commission's processes in this way?

[4] Robin Hairston is Hairston's general partner and holds 51% of the partnership equity. Her husband, Carl Hairston plays professional football with the Cleveland Browns.

[5] The findings under these two issues are interrelated and will be combined.

[6] Note that the letter is dated two days after Mrs. Hairston certified to the partnership's financial qualifications.

[7] Nor did she really have it in writing when she certified to Hairston's financial status on August 29, 1987. *See* Findings 25 *supra.*, and Finding *infra*.

[8] The Presiding Officer has *openly* expressed his concern about the inconsistent and contradictory testimony Robin Hairston gave on this subject. *See e.g.*, Tr. 6391, lines 12-15, and Tr. 6435, lines 5-6.

[9] Anyone checking this citation should be careful; because of a misnumbering error, there are two pages "6464" in Tr. Vol. 19. This citation is to the first page "6464."

[10] While Wainwright testified vaguely and nebulously about what he ostensibly did on Hairston's behalf, that testimony is too amorphous to be credited.

[11] But see Tr. 6464 (first one). There at line 20, Gonzales' counsel asked Mrs. Hairston: "Did he, Wainwright, ever tell you it [Atlantic Coast Equities]" was a lending company? Answer: "Yes" . . . Also see Tr. 6463 where Mrs. Hairston denied ever agreeing with Mr. Wainwright that he would be entitled to a fee for arranging the loan.

[12] "Deal Flow" sounds strangely like a fancy "Finder's Fee" to this uninitiated one.

[13] The Chief, Audio Services Division failed to add a basic qualifying issue against Voth Broadcasting Company although Voth's engineering proposal was identical to Hairston's. So if Voth's application hadn't been summarily dismissed (see Preliminary Ruling, paragraphs 6-9 *supra.*), the *comparative* RF radiation findings that apply to Hairston *supra.*, would also have applied to Voth's application.

[14] But see Tr. 5898, where Crossley says he got some indirect assistance in obtaining financing along with the engineering with its ostensibly button-downed transmitter site.

[15] September 8, 1988 is the day the Chief, Audio Services Division, designated this proceeding for hearing. *See* DA 88-1220.

[16] MCL had previously amended its application on two occasions. *See* FCC 88M-3921 released November 17, 1988, and FCC 89M-65, released January 9, 1989.

[17] Ralph Crossley met Lee Perkinson for the first time on March 10, 1989, long after the hearings in this case were underway. *See* Tr. 5958-5959, and Finding 4 *supra*.

[18] The word "purportedly" is used because the records show that Vanessa Gragg has misappropriated $5,000 of corporate funds and spent it on her personal affairs. Thus, part or all of her 51% stock interest is vulnerable to seizure Tr. 1184-1189, and 801-804). This will be detailed *infra*.

[19] At the prior evidentiary admission session held on January 24, 1989, MBC asked that the written direct case on this point be withdrawn because MBC had determined that certain dates were incorrect. That request was granted (Tr. 88-90). However, the false ledger sheets that Giglio had prepared were not withdrawn (Tr. 886).

[20] MBC filed their application on July 6, 1987. So Giglio and Ms. Gragg were trying to demonstrate that these organizational functions had taken place at or slightly after the filing.

[21] The cut-off date is critical because after it passed MBC could no longer amend its proposal as a matter of right.

[22] If this is evidence of the "special relationship" (Finding 75 *supra*.) between Giglio and Ms. Gragg, it is not the type of "special relationship" he should rely on.

[23] Thus Mr. Giglio, when he believes it appropriate, can take control of MBC by forgiving the $5,000 debt. It doesn't appear that Vanessa Gragg can pay the $5,000 back.

[24] Ms. Gragg added a dollor to the Van's Word Processing Plus account as a symbolic gesture of her contribution (Tr. 1168-1169).

[25] These were the funds from which Ms. Gragg later stole $5,000.

[26] Also see Tr. 1160.

[27] This type of vacillation is extremely disconcerting when you're trying to button down indicia of ownership. The situation wasn't helped by the fact that on two occasions the Presiding Officer had to caution Mr. Polk for coaching his wife while she was testifying (Tr. 1346 and 1804-1805).

[28] In November 1988, after the depositions in this case were taken, GBC amended its Articles and changed the authorized shares from 1,000 to 10,000 (GBC Ex. 6; Tr. 1795-1896).

[29] GBC's stock certificates indicate that the first certificate was issued to Mrs. Polk for 5,100 shares and the second to Mr. Polk for 4900 shares. The corrected certificates were for 1,020 and 980 shares respectively (MCL Ex. 12). The minutes of their organizational meeting (signed by Mrs. Polk) reflect subscriptions for 10,000 shares with 2,000 shares issued.

[30] This is *not* a definitive finding that Sue Polk *deliberately* lied, although at one point in responding to Hairston's counsel, she did say "That *really* was a mistake" (Tr. 1649 -underlining added). This poor woman was really out of it; she had no idea what the truth was. She was simply saying whatever came into her head without any concern for the oath she had taken. The Presiding Officer has lost all respect for white, non-Hispanic males who use their wives, or daughters or female friends as comparative fronts, knowing full well that they do not possess the aptitude to own and operate a broadcast station.

[31] BBL launched its proposal from a far stronger foundation than either MBC or GBC; i.e., an honest, fairly-intelligent general partner who was personally and materially involved in preparing and prosecuting BBL's application. Even though Janet Bolton was subjected to a "trial by endurance," she emerged an honest and truthful witness. *See* FCC 89M-1498, released May 19, 1989, paragraphs 7-9. Moreover, MFM's five shareholders are sufficiently insulated from the general partner so as not to raise any significant "sham" questions. They are, what they appear to be, five non-broadcast professionals (three lawyers and two veterinarians) who have gotten together as an investment venture.

[32] In an interlocutory ruling, the Presiding Officer announced early on that MMC was going to be awarded 0% quantitative integration credit. MMC's refusal to comply with the agreed-upon comparative discovery, and its false representations about that failure to comply convinced the Presiding Officer that this is not the type of applicant one can rely on to carry out its integration proposal or abide by its represented ownership structure. *See* FCC 88M-4339, released December 21, 1988. So even without the ownership structure and control facts that were developed during the hearing *infra*. MMC is deserving of no quantitative integration credit.

[33] MMC purports to be a one-person corporation. No "limited partner" is involved.

[34] Cetain requested documents never were made available.

[35] At that time William Dilday was on the Board of Directors of Sun-Delta Capital, Sun-Delta's parent company. Ms. Watkins claims she wasn't aware of the fact at the time she approached Sun-Delta for the loan letter (Tr. 4544).

[36] At that time Dilday had been previously involved in at least five FCC broadcast and cellular applications (Tr. 4820, 4822-23, 4827-4830, 4855-56 and 5061).

[37] Based on a percentage of capital contribution, Ms. Watkins' so-called 10% interest has shrunk to 1.0%.

[38] United has at least one more stockholder, Howard Dingle. Dingle attended a pre-filing meeting with Ms. Hairston (Hairston Phase III,Ex. 4, p. 19).

[39] The fact that the general partner holds a majority equity (51%) in the partnership weighs-in Hairston's favor.

[40] But see Findings 51-57 *supra*., and 58-67 *supra*.

[41] MCL will be denied the 100% quantitative integration it claims (see *infra*.), but not because of ownership structure problems.

[42] Because RML's ownership structure wasn't credited (Findings 126-130 *supra*.) this claim was never tested. But it is hard to believe she will sever her long-standing business relationship with her other two partners, Mitt Conerly and Leonard H. Carter (see Finding 126 *supra*. and 171-172 *infra*

[43] Jelks never reported his newspaper ownership in his application (Tr. 4145). And according to the Presiding Officer's records, he has never amended his application to reflect that ownership.

[44] The Pittsburgh permit has expired (Tr. 5114).

[45] The Tequesta proceeding has since been settled. *See Tequesta Television, Inc.*, FCC 87R-63 released December 10, 1987.

[46] This *assumes* that all of the remaining applicants are basically qualified.

[47] If Voth Broadcasting Company were still in the case the comparison would go between Hairston and Voth on the one hand, and the other. But Voth is no longer in the case. *See* Findings 6-9 *supra*.

[48] The bulletin entitled "Evaluating Compliance With FCC - specified guidelines for Human Exposure to Radio Frequency Radiation" is dated October 1985.

[49] The Commission regards RF radiation problems as an "important issue." *See* FCC 90-10 released Janaury 11, 1990 at Footnote 2.

[50] Actually the ANSI standards are liberal. All RF radiation standards are currently being reduced; i.e., made more stringent, due to extra absorbent of RF energy around 40 to 90 megaltz.

While RF radiation hasn't yet been conclusively branded a cancer-causing agent, it does pose a significant threat to human health. It is known to cause cataracts and thermal loading. And there is a wide spread concern that it has reproductive, immunological, endocrine, and/or behavioral effects. Radio frequency radiation is far more dangerous than some other types of non-ionizing radiation. For instance, there are more intense exposure and a far greater number of workers are exposed to RF radiation then in the case of microwave radiation. *See Richard L. Oberdorfer*, FCC 87M-1632 released July 13, 1987. For a more detailed summary of the Commission's approach to the RF radiation problem see *Richardson Broadcast Group*, FCC 890-50, released November 9, 1989, Findings 19-31, and Conclusions 8-11.

[51] Again we are *assuming* that all nine applicants are basically qualified to be a Commission licensee.

[52] The Chief, Audio Services Division believes that Hairston's fence proposal does warrant the elimination of the *basic qualifying issue* they faced. The Presiding Officer has honored that belief. *See* Finding 50 *supra*.

[53] Doug McConnell's calculations (Finding 191(a) - (d) *supra*.) seem to suggest that WAOS might presently violate ANSI's RF radiation standards. So if Hairston were granted, we might well face a "shared responsibility" situation. *See Request for Declaratory Ruling: Section 1. 1307 (b) radio frequency radiation compliance*, 5 FCC Rcd 385 released January 18, 1990; also see *Report No. DC - 1531, New Criteria For Evaluating Radio Frequency Radiation Adopted*, released December 22, 1989.

[54] Full comparative findings will be made on all applicants (save Voth). So if an appellate body disagrees with the way a particular applicant is treated, no remand will be required. So findings of fact will be made on all issues, and conclusions of law will be made on all material issues. *See WFPE, Inc.*, 33 FCC 673 (1962) at paragraph 13; *Alkima Broadcasting Company*, 30 FCC 932, 21 RR 732 (1961) at Footnote 2; *Sayger Broadcasting Co.*, 32 FCC 496, 22 RR 1059 (1962) at Footnote 7; 47 CFR 1.267(b); and 5 USC 557(c)(A).

[55] Isn't it a little late to be carrying out this task? *See* Findings 10-16 *supra*.

[56] But see Findings 163-164 where it becomes evident that its Robin Hairston's husband, Carl (Big Daddy) Hairston of Cleveland Brown football fame that is the support for Ms. Hairston's 51%.

[57] A tenth applicant Voth Broadcasting Company's application was dismissed for failure to prosecute. *See* Findings 6-9 *supra*.

[58] A contingent *basic* qualifying issue (an RF radiation issue) against Hairston was dismissed. *(See* Finding 50 *supra*.).

[59] In large multi-party cases such as this one, the trial judges' supervisory powers have limitations. If the case is to move forward at all, the Presiding Officer must enforce a tight but fair set of procedures and make sure all the applicants are aware of the legal tools at their disposal. This was done. *See e.g.*, FCC 88M-3042 released September 16, 1988.

[60] Perhaps these applicants cringed at the prospects of two weeks of depositions in Atlanta; perhaps they cringed at the expense involved. But one thing is sure. They saved neither time nor money. These "trials by endurance" never do. *See* FCC 89M-1498, released May 19, 1989, at paragraph 7.

[61] One applicant even had the chutzpah to request rebuttal.

[62] Even up until the last day of the hearing.

[63] Which, in turn causes one to wonder whether they ever existed in the first place. *E.g.* MMC's alleged bank letter (Finding 137 *supra*.).

[64] Stated another way, there are some applicants who are probably a lot better than they showed themselves to be in this case.

[65] Had he been qualified, Jelks would have received a diversification demerit under the standard comparative issue. *See* Findings 175-176. *supra*.

[66] Keep in mind, Robin Hairston is a college graduate. *See* Finding 254 *supra*. These contradictions and evasiveness can hardly be the product of an uneducated mind.

[67] Even if HBLP had been qualified it would have received a *decisional* demerit under the RF radiation comparison. *See* Findings 188-197 *supra*. In addition, outside of her minority status as a Black female, her qualitative integration was extremely weak, as was HBLP's comparative coverage. *See* Findings 184-187 *supra*., Findings 254-258 *supra*., and Finding 267 *supra*.

[68] Even if MCL had shown itself basically qualified, it would have received a comparative diversification demerit (Finding 183 *supra*., and 0% quantitative integration (Findings 260-262 *supra.)).*

[69] There is no need to evaluate a fifth criterion; i.e., the RF Radiation Comparison, since Hairston is not basically qualified (see Findings 188-197 *supra.)*. Nor is it necessary to evaluate the auxiliary power criterion (Finding 267 *supra.)*.

[70] Note, however, that comparative findings have been made on all four of the best practicable service criterion. It's only further comparative conclusions that aren't needed. *See* Footnote 52 *supra*.

[71] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1/2(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell — Transmittal No. 1445
Tariff F.C.C. No. 129

ORDER

Adopted: April 4, 1990; Released: April 5, 1990

By the Chief, Common Carrier Bureau:

1. On January 5, 1990, Pacific Bell (Pacific) filed Transmittal No. 1445, which would establish various charges and termination liabilities for specially constructed facilities for various customers. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or suspend and investigate Transmittal 1445, to which Pacific replied. Transmittal 1445 is scheduled to become effective April 5, 1990.

2. Transmittal 1445 revises Pacific's Special Construction Tariff to establish charges and maximum termination liabilities for various specially constructed facilities. The services to be offered over these facilities include 212 DS1s on a 560 megabit per second (Mbps) fiber optic transmission system, an additional 25 T-1 lines on existing copper facility, multiple DS3 services linking customer premises to a Pacific central office, a fiber optic digital entrance facility equipped for 5 DS1s, and multiple mini-spans at DS1 or undesignated capacities.

3. MFS asserts that service arrangements characterized by Pacific as special construction services appear to provide DS3 or DS3-equivalent service at ICB rates, thereby violating the Commission's ruling in the *ICB Order*.[1] MFS alleges that Pacific offers no information to establish that unique circumstances require that the proffered services be provided as special construction offerings, and charges that Pacific admits in one case that services will be provided over existing facilities.[2] MFS posits that Pacific characterizes its proposed services as special construction in order to retain ICB pricing for selected customers. MFS Petition at 4.

4. Absent the clarification of services, including "mini spans," "multiple T-1 lines," and "560 Mbps transmission system," MFS contends that it is impossible to determine whether Pacific's proposals are in compliance with the *ICB Order*. *Id.* MFS submits that Transmittal 1445 should be rejected because of the substantial likelihood that Pacific is shielding violations of the *ICB Order* through the use of ambiguous service descriptions.

5. Pacific replies that services offered under Transmittal 1445 are properly within the purview of its special construction tariff since the tariff applies in general when facilities are not available to meet a customer's order for service. In these circumstances, the telephone company constructs facilities even though it is under no obligation to do so and otherwise did not plan to build the facilities required for the service ordered.[3]

6. Pacific also claims that the facilities covered by Transmittal 1445 are being used for the delivery of T-1 tariffed services and not DS3 or DS3-equivalent services, as MFS contends. Pacific argues that if customers were allowed to avoid liability for abandoning facilities specially constructed for them, they would have uneconomic incentive to bypass existing facilities and switch to alternative carriers. *Id.* at 4.

7. The Common Carrier Bureau has reviewed Transmittal 1445, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by Pacific Bell are patently unlawful so as to require rejection or that an investigation is warranted at this time.

8. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate Pacific Bell Tariff F.C.C. No. 129, Transmittal No. 1445, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] MFS Petition at 2 (citing Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*ICB Order), recon. pending).*

[2] *Id.* at 3 (citing Pacific Tr. 1445 at proposed page 138).

[3] Pacific Reply at 2 (citing Pacific Bell Tariff F.C.C. No. 129, Section 2.62).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 11, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR PROTOCOL CONVERSION SERVICES

On March 19, 1990, Pacific Bell and Nevada Bell (Pacific) filed a comparably efficient interconnection (CEI) plan to provide a variety of protocol conversion services on an unseparated basis. In its filing, Pacific states that its Public Packet Switching Network has the capability of providing data transport services to customers whose terminals and host computers operate on a variety of protocols. To do so, however, Pacific states that it must perform a variety of net protocol conversions. Pacific notes that it may expand its offering to include conversion of additional protocols as they become available.

As required in the *Computer III* proceeding (*Phase I Order*, 104 FCC 2d 958 (1986), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988)), the Commission must approve this CEI plan before Pacific can begin implementing the proposed service on an unseparated basis.

In its filing, Pacific describes how it will satisfy the Commission's CEI parameters, and states that it will account for the joint and common costs of the services pursuant to its cost allocation manual. Pacific also describes its plans for complying with the other *Computer III* nonstructural safeguards governing the use of customer proprietary network information, nondiscrimination reporting, and disclosure of network information.

Interested parties should file comments on this plan by **May 7, 1990,** and reply comments by **May 17, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Pacific's plan can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Contel Corporation, File No. ENF-89-10
American Satellite Company,
Contel Federal Systems, Inc.,

Petition for Removal of Conditions.

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1990; Released: April 12, 1990

By the Commission:

1. On May 2, 1989, Contel Corporation (Contel),[1] on behalf of itself, its subsidiaries American Satellite Company d/b/a Contel ASC and Contel Federal Systems, Inc. (CFS), and its telephone operating subsidiaries, petitioned for removal of certain joint activity restraints placed on the parties by the Commission.[2] These restraints were imposed in 1980 and continued in force as conditions for, *inter alia*, various transfers of permits, licenses, authorizations and control among the parties. [3] For the reasons discussed herein, we conclude that the removal of the joint activity restraints is in the public interest. Accordingly, we grant the petition.

BACKGROUND

2. Contel ASC's predecessor, American Satellite Corporation (Am Sat Corp.), was formed in 1972 by Fairchild Industries (Fairchild) and Western Union International to provide domestic satellite communications services. By 1973, however, Fairchild had become sole owner of the corporation. In 1979, to provide new financing, Am Sat Corp. entered a partnership with Contel whereby each partner would own 50% of the new entity, American Satellite Company (Am Sat Company). The Commission approved the transfer to Am Sat Company of Am Sat Corp.'s FCC permits, licenses, certificates and authorizations in the interest of a competitive domestic satellite market, but subject to, *inter alia*, the constraints at issue before us.[4]

3. In 1985, Am Sat Company, Fairchild and Contel petitioned the Commission for transfer of control of Fairchild's interest in Am Sat Company to Contel, making it a wholly owned subsidiary of Contel. Noting that the transfer would not alter the structure of Am Sat Company, and that the remaining parties agreed to continue adhering to the structural separation constraints, the Common Carrier Bureau (Bureau) granted the petition.[5] Am Sat Company began doing business as Contel ASC (ASC).

4. Finally, in 1988, when Contel restructured its subsidiary companies and transferred ASC's federal government communications operations to CFS, a sister subsidiary also wholly owned by Contel, the Bureau approved the transfer of ASC's various permits, licenses, certificates, and authorizations to CFS. Once again, the parties maintained the separation conditions.[6]

5. The parties now seek to have the restrictions removed because they believe those restrictions are no longer consistent with our rules and that our current regulatory requirements are more than adequate to safeguard against anticompetitive behavior.

DISCUSSION

6. During the earliest stages of the emerging domestic satellite industry, the Commission recognized many advantages to the role that a domestic satellite system might play. Despite various risks and uncertainties in such a system, the Commission concluded in 1970 "that domestic satellite communications do have the potential of making a substantial contribution to the nation's communications system."[7] Although two years later the Commission adopted an open, competitive, multiple entrant approach, it required that a satellite equipment supplier establish a separate corporate entity in order to provide satellite communications service.[8] This requirement was similar to that set down in the *First Computer Inquiry* to prevent various anticompetitive practices,[9] and was comparable to the conditions at issue herein.

7. In *Computer I*, as a safeguard against anticompetitive practices, the Commission required the structural separation of regulated common carrier services from nonregulated data processing activities.[10] The restraints originally imposed on Contel in 1980 had a similar separating effect. However, in *Computer II*, the Commission modified its policy of structural separation as applied to the independent telephone companies (ITCs).[11] Based on its conclusion that ITCs lacked sufficient market power to engage in effective anticompetitive activity on a national scale, the Commission determined not to apply structural separation requirements to the ITCs' provision of enhanced services, or to their provision of terminal equipment.[12] Contel argues that this same rationale supports removing the separation conditions applied to its joint activities.

8. The Commission reasoned in *Computer II* that "the separation requirement should be applied only to those telephone companies having sufficient market power to engage in effective anticompetitive activity on a national scale and which possess sufficient resources to enter the competitive market through a separate subsidiary."[13] This rationale is all the more compelling when considering its application to the more firmly established and competitive domestic satellite market of today. The domestic satellite industry has long since passed its early developmental stage and there has been a resultant relaxation of artificial restraints.[14] In 1983, the Commission recognized the extent of competition facing domestic satellite carriers, and after noting that sufficient statutory requirements exist under Title II of the Communications Act adequately to safeguard against anticompetitive conduct, the Commission relaxed its manner of regulating domestic satellite carriers by classifying them as nondominant.[15] The Commission similarly classified as nondominant domestic, interexchange, interstate carriers affiliated with exchange telephone companies, and made such carriers, as well as domestic satellite carriers, subject to forbearance.[16]

9. In its petition, Contel argues that the joint activity restraints are inconsistent with Commission rules and policy and are unreasonable, discriminatory and anticompetitive restrictions on the petitioning parties. Contel agrees that when the conditions were first imposed in 1980, they were consistent with the Commission's policy of maximum structural separation, but observes that over the years, the Commission has reexamined and modified that policy.

10. A major goal of the Commission has been to encourage competition in telecommunications with a minimum of regulatory restraints.[17] We do not think that Contel should continue to be hindered by restrictions initially imposed when the domestic satellite industry was in its formative stage. In addition, we believe the public should benefit from removing the restraints.

11. Removing the restraints at issue herein does not mean that Contel will be free to engage in anticompetitive behavior. We have broad authority to regulate the conduct of carriers to prevent potential abuses and remedy any that might occur. Any entity offering common carrier services remains subject to Title II regulation.[18] The Commission's affiliate transaction rules, established in the *Joint Cost Order*, can be applied to prevent cost shifting between Contel's regulated telephone services and the various other activities undertaken by the above-captioned Contel affiliates. In this regard, as a condition of the relief here granted, Contel is required to apply the Commission's affiliate transaction rules, 47 C.F.R. § 32.27, to any transactions between its operating companies and the above-captioned affiliated companies or their successors.[19] It also will be required to make any necessary changes to that portion of its cost allocation manual which deals with such transactions. Any change in corporate structure, *e.g.*, to absorb ASC and/or CFS into a different or new nonexchange carrier affiliate, would also need to be reflected in Contel's cost allocation manual. Moreover, in the event of anticompetitive conduct, remedies are available pursuant to our complaint processes. *See* Section 208 of the Communications Act, 47 U.S.C. § 208; Sections 1.721-1.735 of the Commission's Rules, 47 C.F.R. §§ 1.721-1.735.[20]

12. Finally, as a condition of maintaining its regulatory status as a nondominant provider of domestic satellite services, Contel will be required to comply with the additional safeguards set forth in the *Fifth Report and Order*. Pursuant to such requirements, ASC and CFS shall maintain books of account separate from Contel's local exchange operations, refrain from jointly owning switching and transmission facilities with Contel's local exchange operations,[21] obtain telecommunications services from affiliated local exchange carriers under applicable tariff, and file semi-annual reports on interexchange circuits added.[22] As the Commission continues to review and revise its regulations applicable to ITCs, in particular, and exchange carriers, in general, Contel and its affiliates will be subject to such refinements.

CONCLUSION

13. We believe that the separation requirements previously imposed on the parties herein constitute an unnecessary burden that inhibits the efficient distribution of products and services. We agree with Contel that these restraints impose additional costs of duplication which may disadvantage Contel. Allowing Contel greater freedom in its business practices should benefit the public by making more services available at lower prices without harm to the public in the form of anticompetitive behavior.

ORDERING CLAUSES

14. Accordingly, pursuant to Sections 4(i)-(j), 201-205, 215, 218-220, and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i)-(j), 201-205, 215, 218-220, 303(r), IT IS ORDERED, that the petition filed by Contel, *et al.*, for the removal of conditions IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Contel, originally Continental Telephone Corporation (Continental Tel), was established in 1960 as a holding company for telephone operating companies.

[2] Public Notice, DA 89-545, released May 19, 1989, solicited public comments on Contel's petition, which were due by June 19, 1989. No comments were received.

[3] *See, e.g.*, Am. Satellite Corp., 80 FCC 2d 254 (1980) (*Am Sat Order);* Am. Satellite Co., Mimeo No. 0269 (released Oct. 16, 1985). In 1988, on an application for assignment of authorizations, Contel indicated its willingness to continue the restrictions. The Common Carrier Bureau granted the application, implicitly continuing the restraints. *See* Form 702 Application for Assignment of Certain Permanent Authorizations (Nov. 4, 1988); Am. Satellite Co., Consent to Assignment, File No. 698-CF-AL-(31)-89 (granted Dec. 1, 1988) (" *1988 Consent to Assignment* ").

[4] *See Am Sat Order*, 80 FCC 2d 254. The following restraints, proposed initially by Contel and Fairchild in 1980, were continued by the Commission in 1985 and 1988:

(1) separate office space and physical facilities;

(2) Am Sat Company employees shared with Continental Tel only in certain administrative areas;

(3) arm's length contracts to be used in Am Sat Company dealings with Fairchild, Continental, or their subsidiaries;

(4) separate books, charts of accounts and financial records; acceptable accounting methods and periodic reports filed;

(5) basic transmission services and facilities to be secured from Continental telcos by tariff where such services and/or facilities are covered by an applicable tariff; otherwise on a non-discriminatory basis by means of intercarrier agreements or contracts.

(6) Am Sat Company services and facilities to be made available on a tariffed basis "to the extent required by the Communications Act and existing or future Commission policies with respect to satellite common carriers", (Application, p. 19) and to be offered on a non-discriminatory basis to customers;

(7) arm's length R&D license agreements between Am Sat Company and either Fairchild or Continental;

(8) no sharing of marketing personnel with any Continental telco; separate Am Sat Company marketing efforts; marketing support may be secured via arm's length contracts from non-telephone operating companies;

(9) no Continental telco financing of Am Sat Company.

Id. at 256.

[5] *See* Mimeo No. 0269, *supra* note 3.

[6] *See 1988 Consent to Assignment*, *supra* note 3.

[7] Domestic Communication-Satellite Facilities, 22 FCC 2d 86, 89-90 (1970).

[8] Domestic Communications-Satellite Facilities, 35 FCC 2d 844, 847, 855 (1972).

[9] Computer Use of Communications Facilities, 28 FCC 2d 267, 269 (1971) (*Computer I*) (citing *Tentative Decision*, 28 FCC 2d 291 (1970)), *aff'd sub nom.* GTE Service Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973); *decision on remand*, 40 FCC 2d 293 (1973).

[10] *Computer I*, 28 FCC 2d at 269.

[11] Second Computer Inquiry, *Final Decision*, 77 FCC 2d 384 (*Computer II*), *modified on reconsideration*, 84 FCC 2d 50 (1980), *further modified on reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC 84-190 (released May 4, 1984).

[12] *Computer II*, 77 FCC 2d at 469. In Separation of Costs of Regulated Telephone Service From Costs of Nonregulated Activities, 2 FCC Rcd 1298, 1304 (*Joint Cost Order*), *modified on reconsideration*, 2 FCC Rcd 6283, 6300 (1987) (*Joint Cost Reconsideration*), *further modified on reconsideration*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, No. 87-1764 (D.C. Cir. Mar. 2, 1990), the Commission ordered the ITCs (except average schedule companies) to use certain cost allocation standards to segregate the costs of nonregulated activities from those subject to Part 67 (now Part 36) of our rules. This accounting separation was considered necessary to deter cost shifting through cost misallocation. Except for those operating subsidiaries that are average schedule companies, the Contel telephone companies are subject to the *Joint Cost Order* requirements. *See Joint Cost Reconsideration*, 2 FCC Rcd at 6299-6300.

[13] *Computer II*, 77 FCC 2d at 469.

[14] *See* Communications Satellite Corporation, 80 FCC 2d 170, 179 (1980).

[15] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252 (*Competitive Carrier*), 95 FCC 2d 554 (1983) (*Fourth Report and Order*).

[16] *Competitive Carrier*, 98 FCC 2d 1191 (1984) (*Fifth Report and Order*).

[17] *Am Sat Order*, 80 FCC 2d at 264.

[18] *Computer II*, 77 FCC 2d at 487.

[19] The Commission has concluded that the affiliate transaction rules need not be applied to transactions between two regulated entities. *See Joint Cost Reconsideration*, 2 FCC Rcd at 6296. Here, however, the Contel operating companies may be dealing with affiliates that provide non-regulated activities as well as regulated, non-telephone activities. Although our affiliate transaction rules, by their terms, may not specifically apply in such an instance, we find it is more in keeping with our policy in this area that Contel record all transactions with these affiliates in the manner prescribed in 47 C.F.R. § 32.27.

[20] *See also* 47 U.S.C. § 218.

[21] We note that this requirement precludes Contel from absorbing ASC or CFS into any of its telephone operating companies.

[22] *See Fifth Report and Order*, 98 FCC 2d 1191 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special
Access Tariffs of
Local Exchange
Carriers

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1990; Released: April 2, 1990

By the Chief, Common Carrier Bureau:

1. By this Order, we require certain local exchange carriers (LECs) to comply immediately with the Commission's *Refund Implementation Order* in this docket.[1] Carriers who failed to comply with the requirements of that *Order* in accordance with the discussion below may be subject to the imposition of forfeitures pursuant to § 503(b) of the Communications Act.

2. The refund obligations from which these compliance issues arise were established in the Commission's investigation in CC Docket No. 85-166 of "strategically priced" special access services. In that investigation, the Commission determined that certain of the "strategically priced" High Capacity (HiCap) special access rates under investigation were unlawful, and ordered refunds. The refund amounts were defined by the *Order* as the lesser of (1) earnings in excess of that prescribed for the special access category; or (2) the amounts necessary to limit HiCap rates during the two earnings periods under investigation to a level which exceeds voice grade special access rates in the same period by no more than 8 to 1.[2] The carriers' special access overearnings were developed from the carriers' Form 492 earnings reports and displayed in Attachment B to the *Order*. The order required the carriers to compute the difference between actual revenues and revenues that would have been produced by an 8 to 1 rate. If the second of the refund amounts was determined to be the lesser, carriers were to refund a pro rata share of the residual overearnings to Digital Data Service (DDS) customers.

3. To implement the refund, the *Order* directed carriers to: file with the Commission within 40 days of the release of this Order a report describing in detail their efforts to effectuate these results. Specifically, the report must identify the total amount of the refunds, the recipients of refunds, the method of payment, their effort to determine who will receive refunds, and how they allocated the refund among potential recipients . . . .Pending final disbursement of the refund, those carriers also must establish within 40 days of the release of this Order interest-bearing escrow accounts at a recognized financial institution, *place the total refund amounts in those accounts*, and provide the Chief of the Common Carrier Bureau with a letter describing those accounts and identifying the escrow agent exercising *sole control* over the account. 5 FCC Rcd at 413 [notes omitted; emphasis supplied]. The *Refund Implementation Order* also required that escrowed amounts include simple interest accrued up to the time of the establishment of the escrow account, calculated at the current Internal Revenue Service rate. The Commission delegated authority for the oversight of this process to the Common Carrier Bureau.

4. The escrow requirements of the *Refund Implementation Order* are unequivocal orders by the Commission under authority of Section 4(j) of the Communications Act.[3] The purpose of the escrow requirement is to eliminate incentives to delay unnecessarily the refund process, and to avoid a premature distribution to customers that may be inconsistent with the final resolution of the carriers' refund obligations. The escrow mechanism achieves these objectives without foreclosing or requiring any particular outcome on the merits of the LECs' refund liability to particular customers.

5. According to their refund plans, a number of LECs have failed to comply with the escrow requirements of the *Refund Implementation Order*. Some LECs have unilaterally reduced the escrow amounts identified in the *Order*.[4] Other LECs have disregarded the interest rate identified in the *Order*,[5] used time periods to calculate overearnings that are inconsistent with the *Refund Implementation Order*,[6] or unilaterally interpreted the DDS refund requirements as inapplicable to them.

6. The carriers apparently have not distinguished between the refund requirements imposed by the Commission and the escrow requirement. While the amount of refunds ultimately disbursed may be further adjusted in the refund process, the requirements of the *Refund Implementation Order* respecting the amounts to be escrowed are not contingent on such adjustments or refinements. The *Refund Implementation Order* contemplates only two adjustments to the overearnings figures in Attachment B (other than possible errors in the calculations of those figures). First, under the terms of the *Order*, carriers must calculate the lesser of the two amounts described in paragraph 2, above. Second, carriers must calculate interest accrued at the current IRS rate. Other adjustments are inconsistent with the escrow requirements in the *Order*.

7. Those carriers who have failed to comply with the *Refund Implementation Order* are hereby ordered to place in their escrow accounts the full amounts specified by Attachment B of that *Order*, subject only to the adjustments noted in para. 6, within three business days of release of this Order.

8. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 204(a), that BellSouth Corporation, Pacific Bell, Southwestern Bell Telephone Company, and US West, Inc. remedy the deficiencies in the escrow accounts required in this proceeding, specified above.

9. IT IS FURTHER ORDERED that the carriers specified in para. 8 report the actions taken to comply with the *Refund Implementation Order* within five business days of release of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 412 (1990) (*Refund Implementation Order*).

[2] 5 FCC Rcd at 413.

[3] 47 U.S.C. § 154(j).

[4] For example, Pacific, Southwestern, and US West reduced their escrow commitment to reflect certain settlement agreements reached with customers in complaint proceedings under § 208 of the Act.

[5] BellSouth accrues interest on special access overearnings at an unexplained 7.63 percent rate rather than the current Internal Revenue Service rate of 11 percent specified by the *Refund Implementation Order* and used by other LECs.

[6] BellSouth inexplicably uses a one-year earnings period rather than the periods specified by the Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-223

In re Applications of

RICHARD P. BOTT, II	File No. BPH-850711MM
RADIO REPRESENTATIVES, INC.	File No. BPH-850711MO
CLARE MARIE FERGUSON	FILE NO. BPH-850712MS

For Construction Permit
for a New FM Station at
Blackfoot, Idaho

ORDER

Adopted: March 28, 1990; Released: April 12, 1990

By the Commission:

1. Before the Commission for consideration are a Decision, *Richard P. Bott, II*, 4 FCC Rcd 4924 (Rev. Bd. 1989); an Application for Review filed July 7, 1989 by Radio Representatives, Inc.; a Contingent Application for Review filed July 6, 1989 by Richard P. Bott, II; and a Reply filed July 21, 1989 by Radio Representatives, Inc. and an Opposition filed July 24, 1989 by Richard P. Bott, II.[1]

2. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed July 7, 1989 by Radio Representatives, Inc. IS DENIED;

3. IT IS FURTHER ORDERED, That the Contingent Application for Review, filed July 6, 1989 by Richard P. Bott, II, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Clare Marie Ferguson has not sought review of the Board's Decision, and therefore the Board's denial of her application is final. Thus, we have not considered or relied on the Board's holdings with respect to the merits of Ferguson's application in our action herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-328

In re Applications of

MAGDALENE GUNDEN PARTNERSHIP	File No. BPCT-850607KK
NORTH BAY TELEVISION, INC.	File No. BPCT-850725LC
MARIN TV SERVICES PARTNERS, LIMITED	File No. BPCT-850725LE

For Construction Permit for a
New Television Station
Novato, California

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1990; Released: April 12, 1990

By the Commission:

1. Before the Commission are: (1) Petition for Reconsideration of the Commission's *Order*, 3 FCC Rcd 7186 (1988), filed by Marin TV Services Partners, Limited (Marin), on January 12, 1989; (2) Supplemental Declaration filed by Marin on January 24, 1989; (3) Opposition filed by North Bay Television, Inc. (NBT), on February 10, 1989; (4) Opposition filed by NBT on February 21, 1989;[1] (5) Reply to Opposition filed by Marin on February 21, 1988 and corrected on February 23, 1989; and (6) Motion to Re-Open Record filed by Marin on February 12, 1990.

I. BACKGROUND

2. Administrative Law Judge Joseph Stirmer granted North Bay's application based on its 77 percent ownership integration credit compared with 10 percent for Marin. 2 FCC Rcd 1223 (ALJ 1987). The Review Board affirmed the ALJ's decision. 2 FCC Rcd 5513 (Rev. Bd. 1987), recon. denied, 3 FCC Rcd 488 (Rev. Bd. 1988). The Commission denied applications for review filed by Marin and Gunden. 3 FCC Rcd 7186 (1988).

3. In denying Marin's application for review, we rejected Marin's argument that our decision in *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), required that we reverse the Board in the instant proceeding because a director of the limited partner, through his law firm, provided legal services to the general partner. *Id.* at 2073 ¶ 6.

4. Marin seeks reconsideration arguing that the Commission based its decision in this case on facts of which official notice was taken by the Board to which Marin has had no opportunity to respond, and that our decision is in direct conflict with *Victory*. We disagree and will deny Marin's petition for reconsideration.

II. DISCUSSION

5. Initially, 47 C.F.R. § 1.115(g) provides that a petition for reconsideration of an application for review will be entertained only in cases where the facts relied on in the petition relate to events which were previously unknown or to circumstances which have changed since the last opportunity to present such matters.

6. Marin argues that it satisfies the rule because the facts that the Board and the Commission relied on were the result of "official notice" taken after the record was closed, and, therefore, after the last opportunity for it to respond to such matters.

7. The relevant facts here are that Broadcast Enterprises, Inc. (BEI), is the sole limited partner in Marin; Douglas B. McFadden was Secretary and a director of BEI until he resigned in October, 1986; McFadden is a member of the law firm of McFadden, Evans and Sill; and Marin is, and has been throughout this proceeding, represented by the law firm of McFadden, Evans and Sill.[2] Those facts have not changed since the record was closed.

8. However, Marin argues that it was not on notice that McFadden's positions with BEI were an impediment to Marin's integration statement until the Board so ruled in its order denying Marin's petition for reconsideration. Thus, Marin asserts that this is the first opportunity it has had to address those facts because Section 1.115 does not allow the presentation of new facts in an application for review.

9. This assertion is contrary both to the facts and the law. First, the facts as they existed when the Board considered this matter have not changed. Marin offers no information not previously in the record. Moreover, the affidavit of Mr. McFadden does not deny either that he was an officer and director of BEI or that his law firm provided legal services to Marin. All other matters in the affidavit are irrelevant. *See Practice and Procedure*, 46 RR 2d 524, 526 (1979) and *Dena Pictures, Inc.*, 46 RR2d 1583, 1586 (1980). If anything has changed, it is Marin's perception of the importance of those facts, which is not a permissible basis for reconsideration under section 1.115(g).

10. Marin also argues that Section 556 of the Administrative Procedure Act, 5 U.S.C. § 556(e) (APA), requires that a party be given an opportunity to respond to the taking of official notice of a material fact not appearing in the evidence in the record. *Petition for Reconsideration*, p. 3. This argument is unavailing to Marin because the question of the impact of McFadden's position as a director of BEI on Marin's integration proposal was raised by North Bay in its exceptions to the ALJ's initial decision and answered by Marin in its reply exceptions. Moreover, Marin could have argued the matter in its application for review, which it did not. Thus, Marin has not been deprived of any rights protected by the APA relating to the decision in this proceeding.

11. Although not required in light of our decision to dismiss Marin's petition on the foregoing procedural grounds, certain arguments raised by Marin will be discussed so that there can be no confusion about our decision. Again, the pertinent facts upon which we made our determination on Marin's application for review are brief and simple: Douglas B. McFadden is a member of the law firm McFadden, Evans & Sill, counsel for Marin in this proceeding, and McFadden was the Secretary and a Director of BEI, a limited partner in Marin for over a year after Marin's application was designated for hearing. The status of the law firm as counsel to Marin is evident on every pleading and appearance throughout the record. That BEI is the limited partner of Marin, with a 90 percent interest, was contained in one of Marin's direct case exhibits and this exhibit was received in evidence at the hearing. Marin Ex. No. 3, Tr. 1461. The only fact relied on by official notice is that McFadden was an officer and director of BEI. This information was provided to the Commission by Marin in an amendment to its application filed September 13, 1985. [3]

12. Moreover, Marin does not dispute the accuracy of this information. Rather, Marin attempts to negate its relevance by characterizing McFadden's position as ministerial in nature, simply a formality in the creation of a corporation. Such a characterization, however, is contrary to our general attribution policy concerning officers and directors of corporate entities, which holds that such interests should be cognizable because the potential influence wielded by these individuals is significant. *See Attribution of Ownership Interests*, 97 FCC 2d 997 at 1025 ¶ 58 (1984). Thus, Marin has failed to demonstrate that McFadden's positions in BEI were not of decisional significance.

13. Douglas B. McFadden was, until October, 1986, an officer and director of BEI, the limited partner in Marin. As such, he was a principal insofar as the integration analysis is concerned. That is, he could not provide any service to the general partner that BEI would be precluded from providing. Clearly, BEI could not provide legal services to Marin without having its equity interest attributed to Marin. As we stated in our *Order* in this proceeding, "the equity interest of limited partners who provide legal representation and counsel to the partnership relating to the licensing and operation of the broadcasting applicant is attributable for comparative purposes." *Magdalene Gunden Partnership*, 3 FCC Rcd at 7186 ¶ 6 (1988), citing *Clarification of Ownership Attribution*, 1 FCC Rcd at 804 ¶¶ 15, 16. Thus, the services performed by McFadden would be no less attributable to Marin.

14. Nonetheless, Marin asserts that McFadden provided no services to the general partner, Marin, and therefore BEI's equity interests should not be attributable. This assertion, however, is without merit because Marin has consistently been represented by McFadden's law firm.[4] *See Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6130 ¶ 29 (Rev. Bd. 1987), affirmed FCC 88-232 (July 23, 1988), which held that a limited partner may not escape attribution where the acts uncharacteristic of a limited partner were carried out by his law firm but not him personally.

15. Although considered and rejected before, Marin again argues that the result here is at odds with *Victory Media, Inc.*, 3 FCC Rcd 2073 (1988), settlement agreement approved, 4 FCC Rcd 368 (1989), proceeding terminated, FCC 89I-01 (Jan. 6, 1989). As we have stated in *Coast TV*, FCC 90-120 (April 5, 1990), to the extent that *Victory* inadvertently suggested that the involvement of an allegedly passive owner in an applicant's activities after the applicant has adopted a bifurcated form of business organization is irrelevant to the question of whether that owner will exercise influence over the management of the applicant in the future, it is hereby expressly overruled. Thus, Marin's argument in this respect is likewise without merit.

III. CONCLUSION

16. For the reasons stated above, Marin has failed to demonstrate that its petition for reconsideration complies with the requirements of section 1.115(g). Moreover, Marin has not shown any reasons why our previous decision violates Commission policy or is not otherwise in the public interest.

IV. ORDERS

17. ACCORDINGLY, IT IS ORDERED, That the Motion to Re-Open Record filed February 12, 1990 by Marin TV Services Partners, Limited IS DISMISSED.[5]

18. FURTHERMORE, IT IS ORDERED, That the petition for reconsideration filed January 12, 1989 by Marin TV Services Partners, Limited IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] This latter Opposition was to a Petition for Reconsideration dated January 31, 1989 by Magdalene Gunden Partnership. While copies of the petition were served on the other parties to this proceeding, there is no record of the pleading being filed with the Commission. Moreover, after review of a copy of the Gunden pleading furnished to us by counsel for Marin TV, we find the petition to be without merit.

[2] The name of the law firm was previously McFadden, Borsari, Evans & Sill.

[3] In an affidavit attached to Marin's Petition for Reconsideration, McFadden indicates that he also holds eight shares of stock in BEI (less than one percent).

[4] It is also of interest to note that, although McFadden's affidavit states that he never directly provided any legal services to the applicant, the original application was submitted to the Commission with a cover letter dated July 25, 1985 and was signed by Douglas B. McFadden, "Attorney for Marin TV Services Partners Limited". The letter also invited the Commission to "contact the undersigned" if there were any questions about the application.

[5] Marin's Motion to Re-Open Record seeks to enter a document into the record allegedly providing evidence that Dennis De Sousa, a limited partner in NBT, is pursuing an active involvement in NBT's affairs, thus corroborating the Review Board's reduction of NBT's integration credit. In light of our decision in this proceeding denying review of the actions below attributing De Sousa's interest in NBT, 2 FCC Rcd 1223 at 1237 and 2 FCC Rcd 5513 at 5516 (1987), Marin's motion may be dismissed without further consideration.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-141

In re Applications of

LEE COUNTY BROADCASTING CO., INC. (hereafter: Lee) — File No. BPH-880519MG

JKRC CENTRAL COMMUNICATIONS LIMITED PARTNERSHIP (hereafter: JKRC) — File No. BPH-880519ND

For Construction Permit for a New FM Station on Channel 229A (93.7 MHz) in Bishopville, South Carolina

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 12, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Lee.* Lee proposes to alter or replace the existing tower used by co-owned WAGS (AM) for AM/FM use. Our engineering study indicates that this proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Lee may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since Lee's proposal may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, it will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. The cumulative effect of the proposed operation and all nearby RF sources must be considered. Accordingly, Lee will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Lee did not complete Item 4 correctly, giving a post office box number as the residence address for James F. Coggins. Accordingly, Lee must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

4. *Other matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Lee in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Lee shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

8. IT IS FURTHER ORDERED, That Lee shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 5, 1990

Released: April 12, 1990

Mr. Jan Reimers
President
ICORE, Inc.
1541 Alta Drive
Whitehall, PA 18052

Dear Mr. Reimers:

This is in response to your letter of May 31, 1989, to Mr. Gerald Brock, on behalf of Swayzee Telephone Company (Swayzee), concerning the Equal Access provisions of Part 36 of the Commission's rules.

In your letter you state that in 1987 Swayzee incurred approximately $20,000[1] in incremental costs for equal access software. You also state that it was more cost efficient for the company to purchase this software at the time that it installed a new digital switch rather than wait until it received a bona fide request for equal access service. Finally, you state that in November, 1988, Swayzee received a bona fide request for equal access service but the National Exchange Carrier Association would not accept your assignment of the company's equal access costs to the equal access category from the date of the request. You therefore, request an interpretation of Part 36 of the Commission's rules concerning the appropriate treatment of Swayzee's equal access costs.

We believe that the net book value of the initial incremental investment should be assigned to the equal access category from the date Swayzee received the bona fide request for an equal access connection to its network. Part 36[2] of the Commission's rules states that costs assigned to the equal access category should include only the initial incremental presubscription costs and the initial incremental expenditures for hardware and software related directly to the provision of equal access which would not be required to upgrade the switching capabilities of the office involved absent the provision of equal access. Moreover, these rules provide two conditions under which a local exchange carrier may assign the costs to the equal access category; (1) when expenditures are used to convert central offices that serve competitive interexchange carriers; or (2) when there is a bona fide request for conversion to equal access.

The Joint Board recommended and the Commission adopted these equal access rules to prevent a carrier from assigning costs to the equal access category when the carrier was not serving more than one interexchange carrier or had not received a request for service from more than one interexchange carrier. However, there is no discussion in either the Joint Board Order [3] or the Commission Order[4] indicating that a carrier could not assign costs to the equal access category after it received a bona fide request for service, even if it made the equal access investment prior to its receipt of the request. Moreover, one of the primary objectives of the equal access provisions was to prevent carriers that do not serve competitive interexchange carriers from assigning costs to the equal access category. We believe that because Swayzee now serves competitive interexchange carriers it has met the test established by the Commission and that it should be allowed to charge the net book value of its incremental investment in equal access software to the equal access category from the date it received its bona fide request.

We hope this explanation clarifies the Part 36 procedures in question. If you have any questions concerning this response, please contact Patricia Shipley of my staff at (202) 632-7500.

Sincerely,

Kenneth P. Moran, Chief
Accounting and Audits Division
Common Carrier Bureau

FOOTNOTES

[1] A supplemental letter of September 13, 1989 from ICORE to Mr. Wilson states that the total purchase price, including installation costs for the equal access software, was $26,000, and the net book value of the software as of June 30, 1989 was $21,352.50.

[2] *See* 47 C.F.R. Section 36.191 and Section 36.421.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules, and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, (released October 8, 1985), 50 Fed. Reg. 47765 (November 20, 1985).

[4] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules, and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, FCC 86-6 (released January 7, 1986), 51 Fed. Reg. 2708 (January 21, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications, Inc.
Revisions to Tariff F.C.C. No. 16

Transmittal No. 2035

ORDER

Adopted: April 6, 1990; Released: April 12, 1990

By the Chief, Common Carrier Bureau:

1. On January 16, 1990, AT&T Communications (AT&T) filed Transmittal No. 2035 to introduce State Outbound Calling Service - Option 2 (SOCS Option 2), an outbound switched telecommunications service to be furnished exclusively to entities of the Nebraska state government. SOCS Option 2 is a version of AT&T's Software Defined Network Service (SDN). According to AT&T, SOCS Option 2 is a discounted service and is neither time-of-day nor distance sensitive. AT&T Description and Justification (D&J) at 2. Petitions to reject, or alternatively, to suspend and investigate the transmittal were filed by US Sprint Communications Company Limited Partnership (Sprint) and MCI Telecommunications Corporation (MCI). The transmittal is scheduled to become effective on April 16, 1990.

2. Sprint states that SOCS Option 2 involves geographically deaveraged, customer-specific rates for what is nothing more than basic SDN service. Also, Sprint maintains that AT&T relies on an inappropriate financial analysis to conclude that SOCS Option 2 is compensatory. Sprint Petition at 2. Both Sprint and MCI claim that the tariff is discriminatory because it offers preferential rates to one class of government customers in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). MCI Petition at 3-4; Sprint Petition at 2-5.

3. In response, AT&T claims that under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), a carrier may establish a government class of service "regardless whether such service is 'like' other services offered at different rates." AT&T Reply at i. AT&T also asserts that its revenue less cost analysis complies with Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, because AT&T used it as part of its justification, rather than as its sole justification, for the tariff filing.

4. On March 23, 1990, AT&T filed further revisions to its Tariff F.C.C. No. 16. The revisions make SOCS Option 2 generally available to institutions of higher education owned and operated by a state government or to state and local government agencies, instead of only such entities in Nebraska.[1]

5. The Common Carrier Bureau has reviewed the initial tariff transmittal, the various pleadings, and the proposed tariff revisions. We conclude that no compelling argument has been presented that the revised tariff is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, to suspend and investigate AT&T Tariff F.C.C. No. 16, Transmittal No. 2035, filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] AT&T filed Special Permission Application No. 716 on March 23, 1990, to waive Sections 61.38 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.38, 61.59, to make its revisions effective on not less than 20 days' notice. Special Permission was granted on March 26, 1990. Special Permission No. 90-312.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Rosemary T. Rakas FOIA Control No. 89-71

On Request for Inspection of Records

ORDER

Adopted: March 12, 1990; Released: April 12, 1990

By the Commission: Commissioner Duggan not participating.

1. On May 4, 1989, Rosemary T. Rakas (Rakas) filed a Freedom of Information Act (FOIA) request seeking disclosure of all documents related to the application of Proffitt Cellular Communications, Inc. (Proffitt) for authority to construct a cellular radio system in the Fargo-Moorhead, North Dakota-Minnesota MSA. Proffitt filed an opposition. On May 17, 1989, the Chief, Common Carrier Bureau granted in part and denied in part Rakas's FOIA request, ordering, *inter alia*, release of a particular agreement between Proffitt and Cellular Technology Acquisition Corporation (CTAC). On June 1, 1989, Proffitt filed an Application for Review, appealing the Bureau's initial decision to disclose the Proffitt/CTAC agreement. Rakas filed an opposition.

2. By letter dated October 20, 1989, Rakas withdrew her FOIA request. By letter dated December 15, 1989, Proffitt indicated that, in light of Rakas's withdrawal, it has no objection to the dismissal of its Application for Review. Accordingly, it is ORDERED that the Application for Review is hereby DISMISSED, and the underlying Bureau decision is VACATED to the extent that it addressed the Proffitt/CTAC agreement.

3. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AERONAUTICAL RADIO, INC.

Petition for Declaratory Ruling

Double Billing of Access Charges in Connection with 800 Service Calls Forwarded From Foreign Exchange Rotary Arrangements

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1990; Released: April 13, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On March 27, 1989, Aeronautical Radio, Inc. (Arinc) filed a petition for declaratory ruling asking the Commission to declare that local exchange carriers (LECs) may not assess "double" access charges on calls to foreign exchange (FX) numbers that are ultimately completed over interexchange carrier-provided 800 Service. At issue is the manner in which certain LECs calculate access charges for a service configuration which Arinc asserts is commonly used by its members in their airline passenger reservation networks. Arinc seeks relief in the form of either a refund to its members of a portion of the amounts collected or a credit to FX subscribers for the terminating carrier common line (CCL) charges. Seven parties filed comments in opposition: the Ameritech Operating Companies (Ameritech), the Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), Pacific Bell and Nevada Bell (PacTel), Rochester Telephone Corporation (Rochester), Southwestern Bell Telephone Company (Southwestern Bell), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West). On June 15, 1989, Arinc submitted a reply. In this Order, we deny Arinc's petition.

II. PLEADINGS

A. *Arinc Petition*

2. Arinc is the communications company of the air transport industry and is owned by the major air carriers and other aircraft operators. Arinc explains that its member airlines subscribe to multiple access facilities from the LECs in order to minimize the possibility that a customer inquiry will be blocked at the originating end. Under the service configuration at issue herein, a number of FX lines[1] are connected into a rotary or "hunt group" arrangement in a LEC central office. Calls to an airline reservations number are transmitted to the LEC central office where the FX lines are terminated. The call is then routed within the central office to the rotary, where the rotary sequentially "hunts" through the FX lines until it finds one that is unoccupied. Arinc Petition at 5-6. The call is then transmitted over the FX line to the Arinc member's reservation center. In order to supplement the capacity of their FX circuits, Arinc's members also subscribe to 800 Service from interexchange carriers (ICs). Arinc states that this backup capability uses remote call forwarding (RCF), a feature generally available from the LEC state or federal tariff. With the addition of RCF, Arinc explains, a call entering the hunt group when there is no unoccupied FX line can be forwarded via the RCF to an 800 number for completion over an IC's network. *Id.* at 6-7.

3. Arinc argues that some LECs improperly bill a forwarded call as if it were both a completed FX call and a completed 800 service call. Arinc claims the LECs bill the airline FX subscriber for the FX/FGA service from the time the call accesses the hunt group facilities in the LEC central office until the 800 call is terminated. In addition, the LEC bills the airline for the RCF feature and bills the IC Feature Group D (FGD) service for the duration of the call. *Id.* at 7-8. Arinc contends that the billing of additional FGA charges for forwarded 800 Service calls violates Section 69.2(gg) of Commission's access charge rules.[2] Arinc contends that if a call is made to an FX number representing a hunt group of FX lines and all such lines are busy: (1) the call will not be completed because it cannot access IC facilities for transmission to its ultimate destination; (2) no acknowledgement of reception by the IC's facilities will be received by the LEC; and (3) therefore, no access minutes and, hence, no chargeable usage, will be recorded on the FGA interconnections. *Id.* at 9-10.

4. Arinc believes that the fact that the RCF rerouting function was specially ordered by the subscriber should make no difference to the carrier's treatment of a rerouted call, so long as the subscriber pays the tariffed rate for that additional service. According to Arinc, the potential customer's attempt to access the FX hunt group equals a call attempt or uncompleted call. Arinc maintains that the caller's transmissions are, by definition, blocked from leaving LEC facilities via the FX lines. As such, Arinc explains, the acknowledgement signal from an IC is never generated, and under the Commission's rules, the measurement of chargeable access minutes never begins. *Id.* at 10-11. Arinc argues that the ultimate reception of the call by the 800 Service provider, which triggers the measurement of chargeable FGD access minutes, cannot also serve as the signal for duplicate FGA billing to commence. *Id.* at 12-13.

5. Arinc also complains that the LECs have been billing its members the full terminating CCL charge for both FX/FGA minutes and the 800 Service/FGD minutes. Arinc argues that since CCL charges compensate for the use of non-traffic sensitive local exchange facilities, there can be no legitimate justification for doubling these charges in an FX overflow situation. It states that, by definition, no additional non-traffic sensitive CCL costs are generated for the network by virtue of employing the RCF function. Arinc also notes that the Commission has emphasized that it will not permit any call configuration that would require or permit the assessment of two terminating CCL charges. *Id.* at 15.

6. As a remedy, Arinc asks the Commission to: (1) declare that LECs may not bill both FGA charges and FGD charges in connection with calls to FX numbers which are remote call forwarded for completion through the use of 800 Service, order the LECs to cease doing so, and order refunds of such unlawfully collected amounts; and (2) require exchange carriers to credit FX subscribers for both past and future terminating minute CCL charges included as part of the FGA charges assessed in that arrangement.

B. ***Comments***

7. Ameritech, Bell Atlantic, BellSouth, PacTel, Rochester, Southwestern Bell, and US West each filed comments opposing Arinc's petition. Ameritech argues that since Arinc's members have elected to link two separate services -- FX/FGA service provided by the LECs and 800 Service provided by ICs -- with a call forwarding feature, two sets of LEC access charges are appropriate. It disagrees that forwarded FX/FGA calls should be treated as unsuccessful call attempts. Ameritech claims that the terms of the call forwarding service Arinc's members utilize clearly contemplate that a two-call situation exists. Ameritech Comments at 1-2. Ameritech also disagrees with Arinc's contention that members utilizing call forwarding should pay less than standard FGA rates or that a specific FGA offering should be configured uniquely for the member airlines. Ameritech notes that the Commission has previously rejected similar demands for user-specific service configurations or rates. Ameritech explains that LEC FGA service offerings have been designed with an eye to the needs of the majority of the users of that service. Ameritech maintains it would be unwise to heed Arinc's request to unravel FGA service. *Id.* at 4-5.

8. Bell Atlantic urges the Commission to reject Arinc's claims that no FGA charges should apply to FGA calls that overflow to 800 Service numbers, and that its members are entitled to a CCL credit. It maintains that the charges for these calls are in complete conformity with the Commission's rules and that Arinc is incorrect in its assertion that LECs have engaged in double billing. According to Bell Atlantic, the Commission has already rejected this argument in holding that WATS and 800 Service resellers -- whose systems use configurations similar to those described in the Arinc petition -- are required to pay originating switched access charges in order to receive calls from end users. Bell Atlantic Comments at 2. Bell Atlantic also argues that Arinc is not entitled to any CCL credit. It asserts that the Commission's rules provide for CCL credits only for MTS or MTS-type services. In Bell Atlantic's opinion, no MTS-type service is at issue here. *Id.* at 3.

9. BellSouth also contends that LEC assessment of FGA access charges for calls forwarded to the 800 Service number is not unlawful double billing. BellSouth explains that when a call is forwarded from the FGA access service to the 800 access service, it utilizes the services, features, and functions attendant to both the FGA access service and the 800 access service. BellSouth takes issue with Arinc's suggestion that the remote call forwarding should be treated in the same manner as alternative service routing arrangements performed by LECs for their own convenience which, historically, have been transparent to the access customer, and therefore, nonchargeable. BellSouth Comments at 3. BellSouth believes the fact that Arinc's service configuration imposes an automatic preference for use of this particular routing distinguishes it from other alternate routing arrangements. *Id.* at 4. Finally, BellSouth argues that Arinc's contentions regarding CCL charges are unfounded. It asserts the rules do not provide for such a credit to a non-reseller *Id.* at 6-7.

10. PacTel argues that in any case in which a call is forwarded from FGA access service to 800 access service, the call utilizes service features and functions of both FGA access service and 800 access service. PacTel contends that Arinc's argument that its members should not receive two charges because of a routing decision made by the LECs mischaracterizes the situation. According to PacTel, the LEC is not routing these calls based on traffic loads, facility outages, and the like. Rather, the LEC is making a specific routing choice in response to a service configuration chosen by the airline. PacTel Comments at 3. Furthermore, PacTel urges the Commission to reject Arinc's argument that the Commission's Rules prohibits assessment of FGA access charges because no acknowledgement of reception by the ICs will be received by the LEC. PacTel maintains that Arinc is ignoring the fact that the acknowledgement of reception by the IC facilities, *i.e.*, "wink-back," is only applicable to trunk side services. PacTel states that there is no corresponding wink-back with respect to line side services such as FGA access. *Id.* at 5.

11. Rochester argues that the Commission's existing rules contemplate that communications utilizing a FGA service and FGD 800 or 800-type service will be assessed access charges for both the FGA and FGD services. In Rochester's view, Arinc's petition amounts to a request that the Commission require other customers of interstate exchange access services to subsidize the access provided to Arinc's member companies. It asserts that Arinc's characterization of a forwarded FGA call as an incomplete call ignores the actual nature of the access service that its members receive and the attendant costs that are incurred to furnish that service. Rochester Comments at 1-2. Rochester also maintains that the use of call forwarding for FGA service in conjunction with 800 access service is clearly distinguishable from circumstances in which an IC reroutes access traffic in order to maintain efficient network usage during peak periods, facility outages, and the like. Rochester explains that in Arinc's case, routing of the call is dictated by the specific service configuration Arinc's members have ordered. It asserts that Arinc, having selected the option of utilizing FGA service in conjunction with an IC's 800 Service, should pay the costs incurred by exchange carriers to furnish those access services. Rochester also agrees with the other commenters that Arinc's members are not entitled to any CCL credit. *Id.* at 3-4.

12. Southwestern Bell attacks Arinc's request on procedural grounds. It claims Arinc has failed to provide sufficient information to enable the Commission to resolve this conflict. According to Southwestern Bell, Arinc's petition fails to: (1) delineate the specific local carriers that may be involved; (2) set forth the extent or amount of alleged overbilling; (3) identify specific areas where the alleged overbilling may have occurred; and (4) describe the degree to which the alleged problem occurs in any particular region of the Nation. Southwestern Bell Comments at 1-2. Without these descriptions, Southwestern Bell argues that the Commission is ill-equipped to determine the merits and justification for Arinc's overbilling

claim. It believes the Commission should refrain from rendering any decision or taking any action unless Arinc supplies sufficient data to the Commission and interested parties. *Id.* at 2.

13. US West also disputes Arinc's contention that its service arrangement involves only one call. In its view there are two calls -- the first from the originator to the remote call forwarding number and the second from the RCF number to another forwarding number. US West explains that in dealing with a remote call forwarding FGA call, the switch simply cannot record the call any differently from a normal FGA call. US West Comments at 3. It states that there is no way to shut off the recording for terminating calls without stopping all the FGA recording capability. US West also states that its tariff does not provide for a credit or suspension of the FGA charges. *Id.* at 5.

14. US West also argues that Arinc's position is inconsistent with Part 69 of the Commission's rules. According to US West, adoption of Arinc's position would require revisions to Part 69 to expand the scope of unbundling or disaggregation of the LECs' access rate elements. Such a material change, it asserts, would require a new Rule Making. With regard to Arinc's CCL charge claims, US West maintains that Section 69.105(c) of the Commission's Rules does not entitle Arinc to receive such a credit. It contends that the IC on the originating end should receive any credit due. *Id.* at 7-10. Lastly, US West argues that a petition for declaratory ruling is not the proper forum for soliciting a refund or resolving a billing dispute. It suggests that Arinc seek relief through the Commission's Section 208 complaint process. *Id.* at 11.

C. *Arinc Reply*

15. In its reply, Arinc asserts that nothing in the oppositions has undermined its contention that the LEC practice of double billing for 800 Service calls forwarded from busy FX numbers is contrary to the Commission's Rules and decisions. Arinc stresses that because the airlines pay the full cost of both RCF and FGD services, there can be no justification for the assessment of FGA charges for calls completed over an IC's network. Arinc Reply at 1-2. Arinc explains its arrangement is not comparable to that of a WATS reseller which uses FGA connections to gather traffic at an IC switch and then send the traffic over a dedicated WATS access line. It states that here, unlike the case of a WATS reseller, where a call from an end user is first routed through the local exchange over the WATS access line, the call never leaves the local exchange until it is transmitted via an IC's 800 service facility to the airline reservation center. Unlike a WATS access reseller, however, the airline does not avoid payment of switched access charges for its use of the local exchange in the absence of assessing FGA charges. Rather, Arinc states, the airline pays RCF charges to route the call to the 800 service and FGD charges as part of 800 Service rates. *Id.* at 7-8.

16. Arinc also disputes US West's claim that it is not technically feasible to differentiate between completed and uncompleted FGA calls. It points to the practices of other LECs which do not engage in the double billing practices challenged here. *Id.* at 11. Arinc also takes issue with the commenters' accusation that it is seeking further disaggregation of FGA rates. Arinc states that it is merely seeking the proper application of existing tariffed FGA, RCF, and 800 Service rates. It argues that the only "additional" step that must be taken is a billing adjustment. According to Arinc, the Commission has repeatedly found that burdens associated with such billing adjustments cannot support the continuation of improper billing. *Id.* at 13. Finally, Arinc argues that if the LECs are permitted to apply terminating CCL charges on both the uncompleted FGA call and the 800 service call, they would over-recover their non-traffic sensitive costs. Since the call has reached the local exchange, and will not transverse another local loop, Arinc asserts that a second terminating CCL charge is unjustified. *Id.* at 14.

17. In response to Southwestern Bell's procedural argument, Arinc states that it has filed a proper petition for declaratory ruling. Arinc faults Southwestern Bell for failing to explain why additional information, such as the amount of over-billing or the precise regions in which the problem occurs, is necessary for the Commission to render a decision. Arinc says that such information would be required only in a complaint proceeding in which a refund in a specific amount has been requested. *Id.* at 4.

III. DISCUSSION

18. Arinc claims that unspecified LECs double bill access charges for calls to foreign exchange numbers that are ultimately completed over IC-provided 800 Service. This dispute between Arinc and the LECs appears to stem not from differing interpretations of the Commission's Rules, but from differing views of how various LECs provide the FX-RCF portion of a call completed over IC facilities. The method a LEC uses to handle this portion of the call determines the manner in which the LEC imposes access charges. Arinc's petition, however, fails to identify the specific local carriers whose practices Arinc finds objectionable or to set forth adequate details of the services allegedly provided by those LECs. This lack of detailed information makes it impossible for us to determine exactly how the LECs are delivering the services involved here so that we can assess whether the charges the LECs impose for the Arinc's service configuration are inconsistent with the access rules. Under the circumstances, we cannot issue the declaratory ruling Arinc requests.

19. Our denial of Arinc's petition should not be interpreted as a determination that the imposition of the access charges Arinic identifies for the service configuration it describes would necessarily be a lawful application of our access rules. We hold only that, in the absence of more detailed information regarding the means by which LECs deliver the services identified by Arinc and, indeed, in the absence of any identification of particular LECs from whom we could obtain such information, we cannot issue the declaratory ruling requested by Arinc.

20. Fact-based disputes such as Arinc's are better suited to resolution through the Commission's complaint process. In a complaint proceeding, Arinc would be required to identify the specific services and the carriers with which it takes issue and, through discovery, would have an opportunity to develop the factual record required to resolve this dispute. Furthermore, the remedy Arinc seeks, repayment of the FGA and CCL charges improperly collected by certain LECs, is one which could be considered in a complaint proceeding. A declaratory ruling could not provide such relief.

21. Accordingly, IT IS ORDERED that the request for declaratory ruling filed by Aeronautical Radio, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] FX lines are treated as a form of Feature Group A (FGA) access for purposes of assessing access charges.

[2] Arinc's reference to Section 69.2(gg) of the Commission's Rules is incorrect. Arinc apparently meant to cite Section 69.2(a), which provides that "on the originating end of an interstate or foreign call, usage is to be measured from the time the originating end user's call is delivered by the telephone company and acknowledged as received by the interexchange carrier's facilities connected with the originating exchange."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS
Complainant,

v. File No. E-90-06

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,
Defendants.

ORDER

Adopted: April 10, 1990; Released: April 13, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications ("AT&T") filed a formal complaint against, inter alia, The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company ("defendants"). AT&T alleged that defendants overstated their 1988 interstate revenue requirements, which resulted in special and traffic sensitive switched access rates for 1988 which were unjust and unreasonable in violation of Section 201(b) of the Communications Act of 1934, 47 U.S.C. § 201(b).

2. On January 8, 1990, the above-captioned parties filed a joint motion in which they state that all claims in this matter against defendants have been compromised and settled between the parties, with defendants admitting no liability therein. Therefore, they conclude that no purpose would be served by continuing the proceeding and request that the Commission dismiss the complaint with prejudice.

3. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaint IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Puerto Rico Communications Authority
Equal Access Conversion Schedule

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1990; Released: April 2,1990

INTRODUCTION

A. *Summary*

1. On January 26, 1990, the Puerto Rico Communications Authority (PRCA)[1] filed a petition for waiver of the Commission's equal access presubscription balloting requirements (Petition) to permit use of its proposed equal access conversion and balloting timetable. We grant PRCA's petition for waiver in most respects subject to conditions.

B. *Background*

2. In the *PRTC Waiver Order*,[2] the Common Carrier Bureau, *inter alia*, extended the deadline for PRTC's conversion to equal access from December 31, 1989 to September 30, 1990.[3] We also waived the existing equal access presubscription balloting requirements to the extent necessary to permit use of the timeline proposed by PRTC.[4] PRTC was required, however, to comply with existing Commission requirements concerning equal access presubscription balloting in all other respects.[5]

II. END OFFICE CONVERSION SCHEDULE

A. *PRCA's Petition*

3. PRCA asserts that the equal access conversion and balloting timetable proposed in its petition is identical in all material respects to the conversion and balloting timetable approved for PRTC, and is designed to enable PRCA to implement equal access throughout its territory in close coordination with the conversion to equal access by PRTC. PRCA states that a contemporaneous transition by PRCA and PRTC to equal access will greatly benefit telecommunications users in Puerto Rico by significantly reducing the potential for customer confusion, and by increasing efficiencies for both off-island and local exchange carriers alike. For example, both PRCA and PRTC could use the same consultants to coordinate their equal access balloting and conversion processes, and off-island carriers would be able to manage their advertising campaigns more efficiently. PRCA adds that both PRTC and all off-island carriers known to be interested in equal access have voiced their approval of PRCA's plan.

4. Thus, PRCA requests Commission authorization:

> (a) to notify interexchange carriers ("IXCs") during the first quarter of 1990, simultaneously with PRTC, of PRCA's equal access conversion plans and ordering requirements; (b) to require IXCs to order . . . [FGD] access by a date 60 days after they are notified of PRCA's equal access conversion plans, which date will also be PRTC's ordering deadline; (c) to distribute the first FGD presubscription ballots for all PRCA end offices, simultaneously with PRTC's distribution of first equal access ballots, on a date 90 days after IXCs are notified of PRCA's equal access conversion plans and ordering requirements; (d) to distribute the second FGD presubscription ballots simultaneously with PRTC, approximately 50 days after the first ballots are distributed; and (e) to complete the conversion of all PRCA end offices to FGD equal access at the latest immediately after PRTC completes its conversion to equal access.[6]

In order to conduct its balloting and allocation process simultaneously with PRTC, PRCA states that its timetable would require off-island carriers to order equal access from PRCA end offices more than 120 days prior to the conversion of its end offices, which requires a waiver similar to the one granted to PRTC.

B. *Positions of the Parties*

5. USTA, MCI, and AT&T generally support PRCA's request for waiver of the Commission's presubscription requirements to allow balloting simultaneously with PRTC.[7] MCI also states that to the extent there may be differences in the implementation plans of PRCA and PRTC, these differences must be fully clarified. In addition, AT&T expresses concern that, under the waiver, PRCA would commence balloting on the same timeline as PRTC, even though PRCA, unlike PRTC, has not yet issued its equal access guidelines even in preliminary form. AT&T argues that as a condition of the waiver, PRCA should be required to issue its own set of presubscription guidelines to off-island carriers or formally adopt PRTC's guidelines before PRCA announces its equal access conversion schedule.[8] In its reply, PRCA states that it will publish its own guidelines for off-island carriers or formally adopt PRTC's guidelines before, or contemporaneous with, PRCA's formal announcement of its equal access conversion schedule. PRCA also states that the guidelines will make plain any differences between PRCA's and PRTC's equal access implementation plans.

C. *Discussion*

6. We believe that PRCA has shown good cause for a limited waiver of our equal access conversion requirements to allow "contemporaneous" conversion by PRCA and PRTC. As PRCA states, such coordinated conversion by PRCA and PRTC will bring the benefits of competition to consumers in Puerto Rico with a minimum of customer confusion and greater efficiency. Moreover, none of the interexchange carriers objects to the proposed timetable. PRCA has also committed to publish guidelines no later than when it formally announces its equal access conversion schedule. Based on these facts and PRCA's commitment, we waive the existing equal access presubscription balloting requirements to the extent necessary to permit PRCA to use its proposed timetable.[9]

PRCA is required, however, to comply with existing Commission requirements concerning equal access presubscription balloting in all other respects.[10]

III. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED, that PRCA's waiver request IS GRANTED to the extent provided herein subject to conditions.[11]

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] PRCA is a government-owned local exchange and intra-island toll carrier, which provides approximately ten percent of intra-island telephone service in Puerto Rico. The Puerto Rico Telephone Company (PRTC), a local exchange carrier that provides approximately ninety percent of intra-island telephone service in Puerto Rico, is also owned by the Commonwealth of Puerto Rico.

[2] Puerto Rico Telephone Company Equal Access Conversion Schedule, *Memorandum Opinion and Order*, 5 FCC Rcd 118 (1989) (*PRTC Waiver Order*).

[3] *See PRTC Waiver Order*, 5 FCC Rcd at 120, paras. 22-23. *See also* Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service Off the Island of Puerto Rico, 2 FCC Rcd 6600 (1987), *pets. for recon. pending* (*Puerto Rico Order*).

[4] *PRTC Waiver Order*, 5 FCC Rcd at 121, para. 29. *See also id.* at para. 25 & n. 86.

[5] *See PRTC Waiver Order*, at 121. para. 29, *citing Puerto Rico Order*, 2 FCC 2d at 6607. Although the *Puerto Rico Order* required PRTC to complete equal access conversion by December 31, 1989, similar requirements were not specifically placed on PRCA, although PRTC stated in that proceeding that PRCA would implement equal access in its service territory during 1988. *Puerto Rico Order*, 2 FCC Rcd at 6606, para. 40.

[6] PRCA Petition at 3. PRTC's timetable states that it will "convert all PRTC end offices to FGD equal access as close to simultaneously as possible during the third quarter of 1990, . . . starting 180 days after IXCs are notified of PRTC's plans and ordering requirements." *See PRTC Waiver Order* at 121, para. 25. PRCA notes that it plans to complete its conversion to equal access, at the latest, early in the fourth quarter of 1990.

In addition, PRCA states that "no end office will be converted to equal access less than 180 days after the availability of equal access has been announced, less than 90 days after the first ballot is distributed, or less than approximately 40 days after the second ballot is distributed." PRTC Petition at 3-4.

[7] USTA Comments at 1-2; MCI Comments at 1-2; AT&T Comments at 1-2.

[8] AT&T also requests that adoption, by PRCA, of PRTC's guidelines include any changes that result from the IXCs' ongoing evaluation and discussions with PRTC.

[9] We approve PRCA's plan "to complete its conversion to equal access, at the latest, early in the fourth quarter of 1990," consistent with its timetable. PRCA Petition at 3 & n. 4. We note that changes in the proposed schedule could require further waivers.

[10] Among other things, guidelines adopted by PRCA must be consistent with our equal access presubscription balloting requirements. Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) *(Allocation Order), modified,* 101 FCC 2d 935 (1985) *(Waiver Order), modified on reconsideration,* 102 FCC 2d 503 (1985) *(Reconsideration Order);* Illinois Citizens Utility Board Petition for Rule Making, 2 FCC Rcd 1726 (1987) *(Illinois Petition).*

[11] This action is taken pursuant to delegated authority provided in Sections 0.91 and 0.291 of the Commission's rules, 47 CFR §§ 0.91 and 0.291 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHWESTERN BELL TELEPHONE COMPANY
Tariff F.C.C. No. 68

Transmittal No. 1921

ORDER

Adopted: April 6, 1990; **Released: April 6, 1990**

By the Chief, Common Carrier Bureau:

1. Transmittal No. 1921, scheduled to take effect on April 8, 1990, would establish individual case basis (ICB) rates for specialized services for Texaco and US Sprint Internal Communications (US Sprint). Southwestern Bell Telephone Company (SWB) proposes one 1.2 gigabits per second (Gbps) "dark fiber" service, with improved protection, between Texaco premises in Houston, Texas. SWB states that Texaco provides the optical to electrical conversion equipment at both ends, and that SWB will provide optical interface and signal regeneration equipment as appropriate. SWB states that the contract period for service is five years (60 months), and that early termination of service will require that the customer make all remaining payments minus SWB's interstate special access authorized rate of return at the time of termination. With regard to US Sprint, SWB proposes a 1.7 Gbps "dark fiber" service between US Sprint premises in Overland Park, Kansas. US Sprint's service contract is for 10 years (120 months) and contains the same termination liability and customer electronics provisions as the Texaco arrangement.

2. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to reject or suspend and investigate Transmittal 1921. MFS asserts that the cost support provided by SWB shows only aggregated numbers for investment and costs and the proposed monthly rate for services. MFS Petition at 2. The cost data, contends MFS, is insufficient and violates Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38. MFS argues that the description of services proposed by Transmittal 1921 is inadequate to determine whether the services are actually dark fiber, as SWB claims. MFS submits that Transmittal 1921 implies that SWB's services are not dark fiber because it describes the services in terms of transmission speed and does not state whether SWB or the customer will provide the electronics at either end of the fiber. *Id.* at 3. Therefore, MFS concludes, it appears that SWB's proposed services violate the Commission's *ICB Order*.[1]

3. SWB replies that the services proposed in Transmittal 1921 are similar to other services it currently offers at ICB rates.[2] SWB states that MFS's petition is apparently an attempt to further contentions made by MFS, in its petition for partial reconsideration and clarification of the *ICB Order*, that averaged rates should apply to dark fiber offerings. SWB further maintains that the cost support it submitted with Transmittal 1921 is provided in the same format as the cost support it filed with its currently effective ICB offerings. SWB Reply at 3.

4. The Common Carrier Bureau has reviewed Transmittal 1921, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by Southwestern Bell are patently unlawful so as to require rejection or that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate Southwestern Bell Telephone Company Tariff F.C.C. No. 68, Transmittal No. 1921, filed by Metropolitan Fiber Systems, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] MFS Petition at 2 (citing Local Exchange Carriers' Inidividual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989)(*ICB Order), recon. pending).*

[2] SWB Reply at 2 (citing SWB Tr. No. 1777, filed Feb. 13, 1989; Tr. No. 1676, filed July 15, 1988; Tr. No. 1825, filed July 21, 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS, INC. — Transmittal No. 2019

Revisions to Tariff F.C.C. No. 16

ORDER

Adopted: April 6, 1990; Released: April 6, 1990

By the Chief, Common Carrier Bureau:

1. On January 8, 1990, AT&T Communications filed Transmittal No. 2019 in which it introduces State Calling Service (SCS), a switched service furnished only to state and local government entities. AT&T also proposes in this transmittal to change the name of Tariff 16 from "Competitively Bid Governmental Services" to "Competitive Governmental Services." US Sprint Communications Company Limited Partnership (Sprint) filed a petition to suspend the transmittal on January 23, 1990, and AT&T filed a reply on February 2, 1990. The tariff is scheduled to take effect on April 8, 1990.

2. SCS is an outbound service offering that provides versions of AT&T Software Defined Network (SDN) and Megacom services which have been modified to meet the requirements of state and local governments. AT&T proposes to offer SCS through two options. Option 1 offers discounts of up to 32 percent off Tariff 1 SDN rates; SCS Option 2 offers discounts of up to 15 percent off Tariff 1 Megacom rates. In addition, SCS offers a discount off international calls, waives certain nonrecurring charges, and offers an additional 25 percent reduction to the total amount of intrastate and interstate usage under the Expanded Discount Plan.

3. Sprint alleges that the existence of SCS would eliminate the need for AT&T's other Tariff 16 state and local government offerings. According to Sprint, it is undisputed that AT&T has two tariffs in effect which offer service specifically to state and local government customers, State Outbound Calling Service (SOCS) and Government Outbound Calling Plan (GOCP), Option 1.[1] Sprint claims it is discriminatory for AT&T to include in Tariff 16, multiple "generally available" state and local government offerings for the same services, at different rate schedules. Sprint Petition at 1-3. Sprint then argues that because SCS is neither the result of a competitive bidding process, a response to a particular offer of another interexchange carrier, nor a unique service arrangement, it should be contained in Tariff F.C.C. No. 1, rather than Tariff F.C.C. No. 16. Moreover, if SCS is permitted to go in effect, then Sprint believes it will be merely a discounted Tariff 1 offering. Therefore, says Sprint, the Commission should require AT&T to assign the full share of SDN and Megacom costs to the SCS service or, in the alternative, should require AT&T to establish separate rates for state and local government customers. *Id.* at 5-6.

4. In addition, Sprint argues that AT&T fails to justify its proposed waiver of various of its nonrecurring charges, in particular the service establishment charge for SCS Option 1. *Id.* at 6. Finally, Sprint claims that AT&T's revenue less cost analysis is deficient because AT&T assumes that there will be no cross-elastic revenue losses, since at present, all state and local government business is lost to competitors. *Id.*

5. AT&T replies that the introduction of SCS will not cause Tariff 16 to contain multiple generally available state and local government offerings for the same services, at different rates. According to AT&T, the differences among SCS, SOCS Option 1 and GOCP Option 1 do not result in unreasonable discrimination because all services are available to all state and local government customers and contain no terms which would preclude conversion from one of these services to another. AT&T Reply at 1-2. Finally, AT&T states that Sprint has not refuted the factual basis underlying AT&T's conclusion that SCS will have no cross-elastic impact on other AT&T services. *Id.* at 5.

6. The Common Carrier Bureau has reviewed the tariff transmittal and the various pleadings. We conclude that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petition to suspend AT&T, Tariff No. 16, Transmittal No. 2019, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] The third tariff identified by Sprint is GOCP, Option 2. Subsequent to the filing of Sprint's petition, the Bureau rejected this tariff. AT&T Transmittal No. 1876, 5 FCC Rcd 700 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

VIRGIN ISLANDS TELEPHONE CORPORATION
Tariff F.C.C. No. 1

Transmittal No. 6

Switched and Special Access
Rate Adjustment

ORDER

Adopted: April 6, 1990; **Released: April 6, 1990**

By the Chief, Common Carrier Bureau:

1. On December 29, 1989, the Common Carrier Bureau initiated an investigation into the reasonableness of the interim switched and special access rates filed by the Virgin Islands Telephone Corporation (Vitelco) under Transmittal No. 6.[1] In the *Designation Order*, we directed Vitelco to submit a direct case by April 6, 1990, demonstrating that its Transmittal 6 rates are not excessive.[2] Vitelco has now filed a petition requesting waiver of some of the information reporting requirements set forth in the *Designation Order* and a motion for extension of the deadline for submission of its direct case.

2. Specifically, Vitelco seeks permission to present the data requested in Items A(2) and A(3) of the *Designation Order* in a different format. Item A(2) directs Vitelco to "specify all costs related to premature plant retirement, extraordinary maintenance expense, and insurance claims or settlements on a monthly basis for total company interstate and all interstate access elements." [3] Vitelco requests a waiver to present the above information on a total company basis rather than on an interstate and access element basis. It maintains that the proposed abbreviated information is sufficient for the Bureau to determine the impact on its rates of premature plant retirement, extraordinary maintenance expense, and insurance claims. Vitelco states that it would provide additional information if it should prove necessary. Vitelco Petition at 3-4.

3. With regard to Item A(3), Vitelco requests that the Bureau waive the requirement that it submit the information on a monthly basis. Item A(3) directs Vitelco to:

> specify earnings and rate of return on a monthly and total basis and in relation to the interstate access elements listed above. Show all earnings, investment, expenses, taxes, and revenues, and detail the inclusion of any costs or revenues related to premature plant retirement, extraordinary maintenance expense, and insurance claims or settlements in these earnings, investment, expenses, taxes, and revenues. Provide the above information for each of the following time periods: (a) January 1, 1989 through August 1, 1989 (b) September 1, 1989 through January 1, 1990 (c) January 2, 1990 through the most recent period for which data is available.[4]

Vitelco states that given the current April 6 deadline, it will be able to provide data only for the two separate reporting periods specified in Item A(3). According to it, the monthly breakdown is extremely onerous and will not provide data necessary to the analysis contemplated by the Bureau. Compilation of these data, Vitelco explains, would cost the company $30,000 in consultant fees. Vitelco states that it will provide the data on a monthly basis if the Bureau, after analysis of the data provided by reporting period, determines that a further statistical breakdown is necessary. Vitelco Petition at 4-5.

4. Finally, with respect to the cost information requested in Items A(1)-(3), Vitelco asks that the Bureau extend the deadline for submission of data related to the 1990 time period until May 15, 1990. It claims that these data will not be available in time to meet the April 6 deadline. *Id.* at 5.

5. We conclude that grant of Vitelco's waiver request with respect to Item A(3) and motion for extension of time will not unduly hinder our investigation of the Transmittal 6 rates. We are aware of the constraints under which Vitelco operates and are willing to accommodate this request. However, should the data Vitelco submits prove inadequate, we will exercise our discretion to require Vitelco to provide the data as originally instructed.

6. We are unable to grant Vitelco a waiver of the information reporting requirements in Item A(2). The presentation of this information on an interstate and access element basis is vital to our investigation of Vitelco's Transmittal 6 rates. Consequently, we direct Vitelco to comply with Item A(2).

7. In light of the fact that Vitelco will not submit its complete direct case until May 15, 1990, we will amend the pleading schedule set forth in the *Designation Order*. Pleadings responding to the direct case may now be filed no later than **June 14, 1990.** Vitelco may file a "Rebuttal" to oppositions or comments no later than **June 28, 1990.**

8. Accordingly, IT IS ORDERED that the petition for waiver and motion for extension of time filed by the Virgin Islands Telephone Corporation IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* Virgin Islands Telephone Corporation, 5 FCC Rcd 112 (Com.Car.Bur. 1989) (*Investigation Order*). In Transmittal 6, Vitelco argued that its current switched and special access rates did not accurately reflect the level of demand in the U.S. Virgin Islands following the damage caused by Hurricane Hugo in

September 1989. Tr. No. 6, Section II, Reason for Filing at 1. Therefore, Vitelco sought to restore its revenue stream to pre-hurricane levels by increasing its interstate switched access rates an average of 28.5 percent and special access rates approximately 2 percent. Tr. No. 6, Section I, Explanation of Changed Matter at 1.

[2] *See* Virgin Islands Telephone Corporation, CC Docket No. 90-124, DA 90-352 (Com.Car.Bur. Mar. 6, 1990) (*Designation Order*).

[3] *Designation Order* at para 4.

[4] *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-143

In re Applications of

ILLINOIS VALLEY BROADCASTING CORPORATION (hereafter "IVBC") — File No. BPH-880505ME

Cynthia Ochs and Charles Tiedmann d/b/a ILLINOIS VALLEY RADIO (hereafter "IVR") — File No. BPH-880505MQ

For Construction Permit
for a New FM Station
in Spring Valley, Illinois
Channel 277A (103.3 MHz)

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *IVBC*. In response to Section III of FCC Form 301 IVBC has certified that he does not have sufficient net liquid assets on hand or available from committed sources to construct and operate the requested facilities for three months without revenue. Accordingly, a financial issue will be specified.

3. Informal objections were filed against IVBC's application by V. Withrow, R. Burke, Jeno Bonucchi, Randall C. Singleton, Nick Van Wingerden and Edwin Twardowski. All The complaints concerned the location of IVBC's proposed antenna. However, by an amendment as of right filed on August 9, 1988, IVBC changed its proposed antenna site to that of an existing tower, thereby mooting the various objections.

4. IVBC petitioned for leave to amend its application on September 28, 1988. The accompanying amendment was filed after August 15, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to IVBC whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the informal objections filed by V Withrow, R. Burke, Jeno Bonucchi and Randall C. Singleton ARE DISMISSED as moot.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by IVBC IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-114

In re Applications of

MEGA MEDIA, LTD. File No. BPH-880415MD
(hereafter "Mega")

E. W. BIE File No. BPH-880415MF
(hereafter "Bie")

For Construction Permit
for a New FM Station
on Channel 258A in Eldora, Iowa

ORDER

Adopted: April 6, 1990; Released: April 9, 1990

By the Chief, Audio Services Division:

1. On February 14, 1990 Mega filed a petition for approval of a settlement agreement in the above-captioned mutually exclusive proceeding for a new FM station on Channel 258A at Eldora, Iowa. The agreement contemplates dismissal of Mega's application in return for consideration to be paid by Bie and grant of Bie's application. However, Mega did not provide a courtesy "drop off" copy of its petition and agreement to the FM Branch, as is the customary practice. As a result, the staff was unaware of the pending settlement request when a hearing designation order was adopted by the Assistant Chief, Audio Services Division on February 27, 1990, and released March 28, 1990.

2. In the future, to ensure that they can avail themselves of the Commission's predesignation settlement procedure, applicants for broadcast facilities are requested to timely provide a courtesy "drop off" copy of the request for approval of settlement agreement seeking to remove a conflict between mutually exclusive applicants pursuant to 47 C.F.R. § 73.3525 to the appropriate branch when the request is filed with the Secretary of the Commission.

3. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. §1.113(a) the Hearing Designation Order in MM Docket No. 90-114 IS RESCINDED.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-159

In re Applications of

DAVIES E. BAHR (hereafter "Bahr")	File No. BPH-880218MA
NITTANY VALLEY BROADCASTERS, LTD. (hereafter "Nittany")	File No. BPH-880219MG
BUDDY BOY KINCER D/B/A BBK BROADCASTING COMPANY (hereafter "BBK")	File No. BPH-880219MP
CLARAVISTA, INC. (hereafter "Claravista")	File No. BPH-880219MQ
BASELINE, INCORPORATED (hereafter "Baseline")	File No. BPED-880219MU

For Construction Permit
for a New FM Station on Channel 225A
in Boalsburg, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 16, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* In the *Report & Order* in MM Docket No. 86-185, 2 FCC Rcd, 33313 (1987), the Commission modified the license of Station WQYX(FM), Clearfield, Pennsylvania, and required Clearfield Broadcasters, Inc. ("CBI"), licensee of WQYX(FM), to file an application for Radio Station WQYX(FM), Clearfield, Pennsylvania, to specify operation on Channel 230B1, a modification of its existing operation on Channel 228A. This move also opened Channel 225A for use in Boalsburg. Subsequently, in the *Report & Order* in MM Docket No. 87-175, 2 FCC Rcd 7148 (1987), the Commission amended its Table of Allocations to include Channel 225A to Boalsburg, Pennsylvania and announcing a window for filing for this allocation commencing January 20, 1988 and concluding February 19, 1988. Five applicants filed for Boalsburg and are the subject of this hearing designation order. All five were found to be short-spaced to the aforementioned WQYX(FM)'s existing facilities operating at Channel 228A. Pursuant to the *Report and Order*, MM Docket No. 86-185, CBI did file a modification application (BPH-871019IA) which would have alleviated this short-spacing. However, on May 26, 1988, CBI's modification application was dismissed due to a short-spacing with Station WQKX(FM), Sunburg, Pennsylvania. The Commission, however, stated in its *Notice of Proposed Rule Making and Order to Show Cause*, MM Docket No 88-496, 3 FCC Rcd 6116 (1988), that WQYX(FM) "cannot operate on Channel 230B1 at its presently licensed site since it would result in a short-spacing to the present operation of Station WKBI-FM at St. Mary's, Pennsylvania." As a result of this situation, the Commission indicated that it would seek comments about proposing that the allocation for Clearfield be moved from Channel 230B1 to 226B1 and that CBI should show cause why its license should not be modified to specify such operation. It also proposed that Boalsburg's allocation be moved from Channel 225A to Channel 229A. Nonetheless, the applicants for Boalsburg will be allowed to proceed to comparative hearing. However, if the Commission ultimately rules that the Table of Allotments be amended to change the Boalsburg channel, the Boalsburg applicants will be afforded an opportunity to amend their respective applications appropriately.

3. *Claravista and Baseline.* Claravista and Baseline propose to operate from the same coordinates (40^0 45' 08" North Latitude, 77^0 45' 16" West Longitude). Both propose use of an existing tower, used by Pennsylvania Educational Communications from which a microwave facility (call sign WGK-627) is currently operating. However, at the same coordinates proposed by the applicants, Commission records indicate two other towers serving State College Cellular Telephone Co. Our records show that these towers are 58.8 meters and 54.9 meters above ground level (AGL), and 796.5 meters and 794.9 meters above mean sea level (AMSL). Baseline proposes operation form a tower specified as 43 meters AGL and 777 meters AMSL, while Claravista proposes operation from a tower specified as 37 meters AGL and 768 meters AMSL. The question then is raised as to which, if either, of the two existing towers would be used by the respective applicants. Accordingly, Baseline and Claravista each must file an amendment clarifying which, if either, tower they propose to use. Additionally, an air hazard issue will be specified below pending resolution of this discrepancy.

4. Engineering study reveals one other discrepancy in Baseline's application: the 339 meters Baseline lists for its proposed antenna height above average terrain (HAAT) in Section V-B, Item 7(b)(3) of the application does not match the 352-meter HAAT calculated from the average of the eight radials listed in Section V-B, Item 19. This discrepancy does not affect the acceptability of the application, since use of either value will not result in a violation of the Commission's technical rules. However, Baseline will be required to amend its application to specify the correct antenna HAAT.

5. *Petition for Leave to Amend.* On August 8, 1988, Baseline petitioned for leave to amend its application by correcting the coordinates of its proposed transmitter site. The petition claims the site, which is an existing tower currently utilized by a licensed microwave facility WGK-627, was incorrectly listed and plotted in its original application. Nittany and Claravista filed "oppositions" to this amendment on August 17, 1988 and August 23, 1988,

respectively, alleging essentially that Baseline was not correcting site coordinates but was attempting to voluntarily change their transmitter site after the passing of time for amending as of right established by 47 C.F.R. § 73.3522(a)(6) had passed.

6. We have examined the record and will accept Baseline's petition for leave to amend and accept its amendments below, even though the amendment is late filed. The Commission's data base indicates a microwave tower at the location specified in the August 8 amendment, and the same tower is clearly referenced in Baseline's application as originally filed. We will take official notice of the data in the Commission's tower records and, because the Commission would have required Baseline to amend its site to specify the correct coordinates, we will grant its petition and accept its amendment for administrative convenience. Accordingly, the objections of Nittany and Claravista will be denied.

7. Nittany filed a "Petition to Deny" the applications of Claravista and Baseline. These petitions are essentially attempts to enlarge issues. Since the Commission's *Report and Order* in re: *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part 1 of the Commission's Rule*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in these petitions have not been considered. Accordingly, an opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229 of the Commission's Rules.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after June 2, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS
Nittany	February 9, 1989
Claravista	October 31 1988; October 3, 1989
Baseline	August 8, 1988 (engineering)

9. *Air hazard.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants BBK, Claravista and Baseline have been unsuccessful. Accordingly, since no determination has been received as to whether the antennae proposed by these applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by BBK, Claravista and Baseline would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That, Baseline and Claravista will submit the amendment called for by paragraph 3 to the presiding ALJ within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That Baseline shall file an amendment clarifying its antenna HAAT with the presiding Administrative Law Judge within 30 days of the release of the Order.

15. IT IS FURTHER ORDERED That, the Petitions for Leave to Amend filed by Nittany, Claravista and Baseline are HEREBY ACCEPTED.

16. IT IS FURTHER ORDERED That, the Petitions to Deny filed by Nittany ARE DISMISSED.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-77

In the Matter of

AT&T
COMMUNICATIONS Transmittal No. 1922
Tariff F.C.C. No. 1

Software Defined Network
Promotional Offering

ORDER DESIGNATING ISSUES FOR INVESTIGATION

Adopted: April 6, 1990; Released: April 10, 1990

By the Chief, Common Carrier Bureau:

1. On February 16, 1990, the Common Carrier Bureau (Bureau) released an Order suspending the above-captioned transmittal,[1] stating that we would subsequently designate specific issues for investigation. The purpose of this Order is to designate for investigation those issues raised by Transmittal No. 1922 and to establish a pleading cycle in this proceeding.

I. BACKGROUND

2. On November 21, 1989, AT&T Communications (AT&T) filed Transmittal 1922 as a promotional offering for one of its Software Defined Network (SDN) plans. AT&T proposes to offer a credit of $450 for any customer location converted to SDN which meets two conditions. First, a customer must have either previously placed an order to AT&T for AT&T's SDN Expanded Volume Plan (EVP) Part II service (with the service being installed after November 21, 1989) or the customer must place an order for SDN EVP Part II not later than one month after Transmittal 1922 has taken effect and request installation to be made not later than within four months after Transmittal 1922 becomes effective. AT&T Description and Justification at 1-2. Second, the customer must demonstrate that prior to November 21, 1989, the customer received a proposal from another interexchange carrier (IC) for an SDN-like service which offered the customer a credit to offset usage charges for all the customer's locations served by the competitor until the competitor's SDN-like service is installed. *Id.*

3. US Sprint Communications Company Limited Partnership (Sprint) petitioned against Transmital 1922, asserting that the tariff was unreasonably discriminatory because it required that a customer have an offer in hand by November 21, 1989. Sprint also denied that the tariff was a legitimate competitive response to another carrier's offer.[2] AT&T replied that Transmittal 1922 was consistent with Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), that the tariff was a legitimate competitive response to an offer made by Sprint to a Georgia customer, and that the tariff was not unreasonably discriminatory because it was available to similarly-situated customers.[3]

II. DESIGNATION OF ISSUES TO BE INVESTIGATED

4. In our *February Order*, this Bureau identified two problems with respect to Transmittal 1922. First, the tariff contains language that is vague, in apparent violation of Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2. Specifically, we noted that the word "demonstrate" (contained in the second of AT&T's two promotion requirements) was not explained or used in such a way so that customers could understand what was expected of them.[4] Moreover, AT&T provided no definition of what constitutes "SDN-like" service. Second, we observed that the combination of provisions in Transmittal 1922 might in fact restrict this particular offer to one particular customer.

5. AT&T is therefore directed to reply to the following questions:

(1) Are the ordering windows set forth in Transmittal 1922 so narrow as to constitute a single customer offering? If so, does this AT&T offering create unreasonable discrimination in rates charged to AT&T customers for like communications services in violation of Section 202(a) of the Communications Act?

(2) What does the term "SDN-like" mean, as such term is used in the tariff?[5]

(3) What guidelines does AT&T intend to apply for purposes of determining what constitues a "similar offer"? Explain the operation of these guidelines in detail, as well as the basis and justification for the guidelines.

(4) Under the terms of the tariff, how would a customer "demonstrate" that the customer has received a similar offer from another IC? Must the demonstration be in writing? Would there be circumstances in which the nature of the demonstration would vary among customers?

III. PROCEDURAL MATTERS

6. This investigation will be conducted as a notice and comment proceeding. AT&T shall file a direct case not later than April 30, 1990. The direct case shall present AT&T's position with respect to the issues described in this Order. Pleadings responding to the direct case must be filed not later than **May 15, 1990,** and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." AT&T may file a "Rebuttal" to oppositions or comments not later than **May 22, 1990.**

7. An original and seven copies of all pleadings shall be filed with the Secretary of the Commission. In addition, one copy shall be delivered to the Commission's commercial firm for copying, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner may do so by

submitting one copy of their comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

8. *Ex parte* contacts (*i.e.*, written or oral communications which address either the procedural or substantive merits of the proceeding which are directed to any member, officer, or employee of the Commission who may reasonably be expected to be involved in the decisional process in this proceeding) are permitted in this proceeding until a public notice of scheduled Commission consideration of a final Order is released and after the final Order itself is issued. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commission's Rules, 47 C.F.R. § 1.1200 *et seq.*

9. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

10. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection, or recordkeeping, labeling, disclosure, or other record retention requirements as contemplated under the statute. *See* 44 U.S.C. § 3502(4)(A).

IV. ORDERING CLAUSE

11. IT IS ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* AT&T Communications, Transmittal No. 1922, CC Docket No. 90-77, 5 FCC Rcd 1238 (Com.Car.Bur. 1990) (*February Order*).

[2] *See February Order*, 5 FCC Rcd at 1238.

[3] *Id.*

[4] *Id.* Transmittal 1922 states that the customer "must demonstrate that prior to November 21, 1989, the Customer received a proposal from another interexchange service provider for SDN-like service which offered the Customer a credit to offset usage charges for all Customer locations served by the competitor until the competitor's SDN-like service is installed." *See* AT&T Communications, Tariff F.C.C. No. 1, Transmittal No. 1922, Section 8.1.1(R).

[5] *See* note 4, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-150

In re Applications of

FRANK DIGESU, SR. (hereafter "Digesu")	File No. BPH-880126ME
VIRGINIA GRIFFITH (hereafter "Griffith")	File No. BPH-880127MN
MERIDIAN BROADCASTING, INC. (hereafter "MBI")	File No. BPH-880128MK
GRISHAM BROADCASTING COMPANY, INC. (hereafter "Grisham")	File No. BPH-880128ML
LINDA L. ALT (hereafter "Alt")	File No. BPH-880128MO
WILLIAM L. MALONE (hereafter "Malone")	File No. BPH-880128MR
BRENDELL BROADCASTING CORP. (hereafter "Brendell")	File No. BPH-880128MS
KPI COMMUNICATIONS, INC. (hereafter "KPI")	File No. BPH-880128MW

For Construction Permit for a New
FM Station on Channel 231A (94.1 MHz)
in Meridianville, Alabama

HEARING DESIGNATION ORDER

Adopted: March 6, 1990; Released: April 17, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *MBI*. Information before the Commission indicates that MBI was organized and is affiliated with Sonrise Management Services ("Sonrise"). Sonrise has been the subject of numerous "real party-in-interest" issues added by presiding Administrative Law Judges in a number of mutually exclusive proceedings. For example, issues concerning Sonrise have been designated in each of the following proceedings:

City/State	Docket No.
Solona, Florida	87-464
Rockledge, Florida	87-556
Silver Springs, Florida	88-119
East Ridge, Tennessee	88-122
Des Moines, Iowa	88-238
Nags Head, North Carolina	88-277
Tyler, Texas	88-280
Raleigh, North Carolina	88-306
Sedona, Arizona	88-335
Mableton, Georgia	88-400
Evansville, Indiana	88-403
Swanton, Ohio	88-432
Atlantic City, New Jersey	88-433

Identical issues were specified in each of these proceedings: whether or not Sonrise was a real party in interest in the subject applicant, whether or not the applicant's organizational structure was a sham, and the effect thereof on the applicant's qualifications to be a Commission licensee. In each of the proceedings listed above, the Sonrise-affiliated applicant has dismissed its application rather than resolving these issues. These unresolved issues call into question MBI"s qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against MBI in this proceeding.

3. Item 5(e) of Section II, FCC Form 301 (October 1986) requires applicants to indicate if the applicant or any party to it has or has had an interest in "an application in any pending or concluded Commission proceeding which left unresolved character issues against the applicant." If answered in the affirmative, the applicant must provide the name of the party having an interest, the nature of the interest or connection and dates, the call letters or file number of the application or docket number, and the location. MBI indicated in Exhibit 3 of its application that shareholders Frederick Bainbridge and Bennie Hewett were limited partners in Dewitt, Michigan applicant Great Lakes FM Limited Partnership (File No. BPH-870914MU); however, MBI failed to amend its application to state that such issues were specified against Great Lakes FM Limited Partnership and, pursuant to that applicant's subsequent request, the application was dismissed with prejudice. *See Lansing Community College*, FCC 89M-1857 (released July 12, 1989) and FCC 89M-1930 (released July 24, 1989), respectively. Accordingly, an appropriate issue will be specified below.

4. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. MBI has not completed Item 4 correctly, giving only a post office box number as the residence address for Joe Biddy, Douglas L. McMahan, Ray E. Newman, Jimmy N. Williams and James Cornett. Accordingly, MBI must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. *Malone*. Malone has listed the antenna height above average terrain ("HAAT") as 300 meters on its antenna sketch (Exhibit TE-2). Since this figure is specified in Section V-B, Item 7(b)(3) and all other portions of of the application as 100 meters, the discrepancy can be resolved, reliably and confidently, drawing upon the ap-

plication as a whole. While this matter does not reflect on the acceptability of Malone's application, the applicant will be required to submit a corrective amendment with the presiding Administrative Law Judge.

6. *Other matters.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and applicants MBI, Malone and Brendell have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by these applicants would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Sonrise Management Services, Inc. is an undisclosed party to MBI's application.

2. To determine whether MBI's organizational structure is a sham.

3. To determine whether MBI violated Section 1.65 of the Commission's Rules, and/or lacked candor, by failing to report the designation of character issues against other applicants in which one or more of its shareholders has an ownership interest and the dismissal of such application with unresolved character issues pending.

4. To determine, from the evidence adduced pursuant to Issues 1 through 3 above, whether MBI possesses the basic qualifications to be a licensee of the facilities sought herein.

5. To determine whether there is a reasonable possibility that the tower heights and locations proposed by MBI, Malone and Brendell would constitute a hazard to air navigation.

6. To determine which of the proposals would, on a comparative basis, best serve the public interest.

7. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That MBI shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That Malone shall submit an amended antenna sketch pursuant to paragraph 5 hereinabove with the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-149

In re Applications of

SOLEDAD RADIO LIMITED PARTNERSHIP (hereafter "Soledad")	File No. BPH-880602OC
KYRA O. KRULICKI (hereafter "Kyra")	File No. BPH-880602OI
MONTEREY COUNTY BROADCASTERS, INC. (hereafter "Monterey")	File No. BPH-880602NL (Previously Dismissed)

For Construction Permit
for a New FM Station on
Channel 287A (105.3 MHz)
in Soledad, California

HEARING DESIGNATION ORDER

Adopted: March 6, 1990; Released: April 17, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* A petition for reconsideration of the dismissal of Monterey's application for a new FM station for Soledad, California was filed on September 1, 1989. This application was dismissed by Commission letter dated July 28, 1989, because the power/height combination proposed would exceed that allowed a full class A station at the time of the Monterey filing. The petition is based on the showing that Monterey's proposed 1 mV/m contour would not extend beyond the 1 mV/m contour of a station operating with the maximum Class A ERP/HAAT combination of 3 kw/100 meters from the same location.

3. 47 C.F.R. § 73.211(b)(2) states, "if a station has an antenna HAAT greater than the reference HAAT for its class, its ERP must be lower than the class maximum such that the reference distance does not exceed the class contour distance." Moreover, 47 C.F.R. § 73.211(b)(1)(i) states "the reference distance of a station is obtained by finding the predicted distance to the 1 mV/m contour using Figure 1 of § 73.333 and then rounding to the nearest kilometer. Antenna HAAT is determined using the procedure in § 73.313. If the HAAT so determined is less than 30 meters (100 feet), a HAAT of 30 meters must be used when finding the predicted distance to the 1 mV/m contour." The proposed facilities would have a reference distance of 26 kilometers, which exceeds the reference distance permitted in 47 C.F.R. § 73.211(b) (i.e. 24 kilometers).

4. Monterey did not use the method of calculation prescribed in the rules. Rather, Monterey erroneously relied on a method based on a comparison of contours along individual radials. As demonstrated by the petitioner, this method yields results at variance with those obtained from the method prescribed in the rules. In this case, the method relied upon by the applicant resulted in a violation of the rules. Finally, contrary to the applicant's assertion, the applications of Kyra and Soledad comply with the rules. Accordingly, Monterey's petition for reconsideration will be denied.

5. *Soledad.* Soledad proposes in Section V-B, Item 7(b)(3) an Antenna Height Above Average Terrain (HAAT) of 213 meters. However, the HAAT as calculated from the eight radials given in Section V-B, Item 19 is 206 meters. Since, using either HAAT value the proposal does not violate any Commission Rule, this is neither a tenderability nor an acceptability defect, and may be cured with an amendment. Accordingly, Soledad must submit an amendment with the appropriate exhibit within 30 days of the date of this Order, clarifying the HAAT discrepancy.

6. The sites proposed by Soledad and Kyra in this proceeding conflict with a pending Rule Making proceeding to modify the frequency of KOCN(FM), Pacific, California from Channel 285A to Channel 286B1 (Docket No. 90-17). At the time that the Soledad and Kyra applications were filed, a petition for Rule Making had not been filed. Consequently, both proposals met all the spacing criteria of 47 C.F.R. Section 73.207(a) and were accepted for filing. Accordingly, these applications will be designated for hearing. However, the construction permit issued to either of these applicants will be conditioned upon the outcome of the KOCN(FM), Pacific, California, Channel 286B1 Rule Making proceeding.

7. Soledad petitioned for leave to amend its application on June 1, 1989. The accompanying amendment was filed after September 7, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR

HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Monterey IS DENIED.

12. IT IS FURTHER ORDERED, That Soledad shall clarify the HAAT discrepancy described in paragraph 5 with an appropriate amendment filed with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That, in the event that Soledad or Kyra is the successful applicant in this proceeding, the construction permit shall be conditioned as specified in paragraph 6, above.

14. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Soledad IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-126

In the Matter of

Amendment of Section 73.202(b), RM-6142
Table of Allotments,
FM Broadcast Stations.
(Philpot, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 20, 1990; Released: April 17, 1990

By the Chief, Allocations Branch:

1. Pursuant to the request of Ted Johnson (petitioner) the Commission has before it for consideration the *Notice of Proposed Rule Making*, 3 FCC Rcd 1940 (1988), proposing the allotment of Channel 264A to Philpot, Kentucky, as that community's first local FM service. Dubois County Broadcasting, Inc. (WBDC), licensee of WBDC Radio, Huntingburg, Indiana, filed a counterproposal.[1] WBDC also filed a "Petition to Accept Supplement to Counterproposal" and "Supplement to Counterproposal".[2] Petitioner filed comments reiterating his intention to apply for the channel, if allotted. In response to the *Notice*, Phil Eans, an employee of WKCM(AM), Hawesville, Kentucky, and Martin L. Hensley each filed supporting comments. Petitioner filed reply comments in opposition to WBDC's counterproposal.

2. An engineering analysis confirms that Channel 234A can be allotted to Philpot, Kentucky, in compliance with the minimum distance separation requirements of the Commission's Rules with a site restriction of 2.4 kilometers (1.5 miles) southeast of the community.

3. In view of the above information, we believe the public interest would be served by allotting Channel 234A to Philpot, Kentucky, as a first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Philpot, Kentucky	234A

4. The window period for filing applications will open on **June 4, 1990,** and close on **July 5, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] WBDC's counterproposal requested that we utilize a different channel at Philpot. It did not request an upgrade in the channel of WBDC at Huntingburg, nor did it request channel substitutions at Scottsburg, Illinois or Russellville, Kentucky. These changes were first requested well after the comment date in this proceeding in WBDC's supplement.

[2] Although we will treat WBDC's counterproposal as comments in this proceeding and will grant its request insofar as we allot a different channel to Philpot, the changes requested in the supplement constitute an untimely counterproposal and will not be considered in accordance with Section 1.420(d) of the rules and the Appendix to the *Notice* in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-201

In the Matter of

Amendment of Section 73.202(b), RM-7185
Table of Allotments,
FM Broadcast Stations.
(Fayetteville, Arkansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 21, 1990; Released: April 17, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of Demaree Media, Inc., (petitioner), licensee of Station KKEG(FM), Channel 221A, Fayetteville, Arkansas, seeking the substitution of Channel 221C3 for Channel 221A and modification of its license to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 221C3 can be allotted to Fayetteville at the petitioner's specified site 20.5 kilometers (12.7 miles) northeast[1] of the community in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. Our engineering analysis also reveals that the 1 mV/m contour of requested Channel 221C3 at Fayetteville would lie within the Grade B (47 dBu) contour of Station KOTV(TV), Channel 6, Tulsa, Oklahoma. In such instances, the Commission has expressed its concern regarding the effect potential upgrades on Channel 221 may have on the availability of noncommercial educational channels operating on Channels 218, 219 and 220 in markets where there exists a TV Channel 6 operation. In such markets, the existence of a TV Channel 6 station effectively restricts the use of the lower portion of the noncommercial educational band, while upgrades on Channel 221 could restrict the use of the higher portion of the spectrum. In accordance with the *First Report and Order* in MM Docket No. 86-144, 52 Fed. Reg. 8259, March 17, 1987, petitioner should provide a preclusion study demonstrating the impact of allotting Channel 221C3 to Fayetteville on the availability of Class A, C3, C2, C1 and C noncommercial educational allotments on Channels 218, 219 and 220. Guidelines for the preclusion study are as follows:

(a) The preclusion study should be done on each affected channel for each possible class of noncommercial FM station (that is A, B1 and B in zone I and 1A or A, C3, C2, C1 and C in zone II).

(b) For each class of noncommercial educational FM station, maximum power and antenna height and omnidirectional operation should be assumed.

(c) Preclusion should be considered to occur only if the noncommercial educational FM station would be prevented by the upgrade, and is not already precluded either by the existing Channel 221 station that is the subject of the proposal or by other commercial or noncommercial educational FM stations.

(d) Preclusion should be determined both inside of and outside of the channel 6 Grade B contour. While the existence of the channel 6 station imposes a burden on noncommercial educational FM applicants, determination of the preclusive effect of the channel 6 station can be complicated and may be dependent on the particular transmitter site selected. Therefore, the initial preclusion area determination should be done without considering the channel 6 station's impact. The channel 6 impact can be included at a later stage of the study, if necessary.

(e) Within any identified preclusion area, significant communities, normally those with a population in excess of 1000, should be identified. Existing local noncommercial educational FM stations in the precluded communities should be listed.

(f) Optionally, if precluded communities without local noncommercial educational FM service are found, additional information can be provided, including:

(i) Availability of noncommercial educational FM service from stations licensed to nearby communities;

(ii) Availability of other channels for a noncommercial educational FM station in the precluded community (include consideration of channel 6 station impact); and

(iii) Impact of channel 6 on noncommercial educational FM channel availability in the community. If a precluded community is a reasonable distance beyond the Grade B contour of the channel 6 station, then it is possible that the channel 6 station has no effect on the availability of a particular class of noncommercial educational FM station in that community. The non-commercial educational FM channel that is closest to channel 6 in frequency, and therefore most likely to be affected is channel 201. Preclusion in a community that is beyond the channel 6 impact distance is not significant. The appropriate distance for class C stations is found in Table A of Section 73.525(a)(1) of the Commission's Rules. Lesser distances are appropriate for other classes of noncommercial educational FM stations. For convenience, the distances have been calculated and are as follows:

Class	Distance from Channel 6 station
A	165 kilometers
B1	189 kilometers
B	207 kilometers
C3	189 kilometers
C2	207 kilometers
C1	234 kilometers
C	265 kilometers

Precluded communities within these distances from the channel 6 station generally constitute a negative factor to be weighed against the public interest gains sought through the upgrade.

4. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 221C3 for Channel 221A at Fayetteville, Arkansas. As requested, we also propose to modify the Class A license of Station KKEG(FM) to specify operation on Channel 221C3. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 221C3 at Fayetteville.

5. Accordingly, in order to provide Fayetteville with an additional expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Fayetteville, Arkansas	221A, 280C1, 300C	221C3, 280C1, 300C

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 8, 1990,** and reply comments on or before **June 25, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Demaree Media, Inc.
Attn: Patrick Demaree, President
P.O. Box 878
Fayetteville, AR 72702

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and

Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for proposed Channel 221C3 at Fayetteville are 36-11-00 and 93-59-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-202

In the Matter of

Amendment of Section 73.202(b), RM-7134
Table of Allotments,
FM Broadcast Stations.
(Barstow, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 21, 1990; Released: April 17, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of First American Communications Corp. (petitioner), licensee of Station KDUC(FM), Channel 232A, Barstow, California, seeking the substitution of Channel 232B1 for Channel 232A and modification of its license to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 232B1 can be allotted to Barstow at the petitioner's present transmitter site,[1] in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. However, since Barstow is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain concurrence of that Government in the proposal.

3. Although petitioner requested the issuance of an *Order to Show Cause* in connection with its modification request, such action is not required. Rather, since the petitioner's modification request conforms with the provisions of Section 1.420 of the Commission's Rules, we shall propose to modify the facilities of Station KDUC(FM), as requested, in the event Channel 232B1 is substituted for Channel 232A at Barstow, without entertaining other expressions of interest.

4. Accordingly, in order to provide Barstow with an expanded coverage service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Barstow, California	232A, 240A	232B1, 240A[2]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 8, 1990,** and reply comments on or before **June 25, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert A. Marmet, Esq.
Harold K. McCombs, Jr., Esq.
Marmet and McCombs
1822 Jefferson Place, NW
Washington, DC 20036

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates at the licensed site of Station KDUC(FM) are 34-58-15 and 117-02-22.

[2] The Commission is currently considering a proposal to substitute Channel 240B1 for Channel 240A at Barstow. *See Notice of Proposed Rule Making,* 4 FCC Rcd 6210 (1989), in MM Docket No. 89-345.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-203

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Plymouth, Indiana)	RM-7228

NOTICE OF PROPOSED RULE MAKING

Adopted: March 21, 1990; Released: April 17, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed by Community Service Broadcasters, Inc., (petitioner), licensee of Station WNZE(FM), Channel 232A, Plymouth, Indiana, seeking the substitution of Channel 232B1 for Channel 232A and modification of its license accordingly, to specify the higher power channel.

2. A staff engineering analysis of the proposal reveals that Channel 232B1 can be allotted to Plymouth at the petitioner's specified site 18 kilometers (11.2 miles) north[1] of the community in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.

3. We believe the proposal warrants consideration. Therefore, we shall propose to substitute Channel 232B1 for Channel 232A at Plymouth, Indiana. As requested, we also propose to modify the Class A license of Station WNZE(FM) to specify operation on Channel 232B1. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 232B1 at Plymouth.

4. Accordingly, in order to provide Plymouth with its first expanded coverage FM service, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Plymouth, Indiana	232A	232B1

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 8, 1990,** and reply comments on or before **June 25, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Community Service Broadcasters, Inc.
Attn: Kenneth E. Kunze, President
112 W. Washington St.
Plymouth, IN 46563

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for proposed Channel 232B1 at Plymouth are 41-30-18 and 86-17-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-281

In the Matter of

Amendment of Section 73.202(b), RM-6959
Table of Allotments,
FM Broadcast Stations.
(Bethel, Alaska)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 20, 1990; Released: April 17, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 5357 (1989), issued on its own motion, proposing, *inter alia*,[1] the reclassification of Station KBTB(FM), Channel 300A, Bethel, Alaska, to Channel 300C3, and modification of the permit issued to Bethel Communications, Inc. ("BCI") to specify the higher powered channel. BCI filed a counterproposal,[2] as well as reply comments in support. The Federal Aviation Administration ("FAA") also filed comments.[3]

2. BCI counterproposed the substitution of Channel 252C3 for Channel 300A in lieu of Channel 300C3, based upon a letter it received from the FAA[4] communicating the results of an aeronautical study, indicating that operation of Station KBTB(FM) on Channel 300 will severely interfere with the Instrument Landing System ("ILS") final approach course at Bethel. However, the FAA indicated it has no objection to consideration of another channel for use at Bethel, and suggested that Channel 252 will not impact the ILS in any manner.

3. In response to the counterproposal, BCI states that the allotment of Channel 252C3 to Bethel will allow it to provide expanded coverage to the community, while eliminating the FAA's concerns about the ILS final approach course at Bethel. No other expressions of interest in the use of Channel 252C3 were received.

4. We believe the public interest will be served by the substitution of Channel 252C3 for Channel 300A at Bethel, since it could provide an expanded coverage FM service to the community. Channel 252C3 can be allotted to Bethel at the site specified in the construction permit issued to BCI for Station KBTB(FM),[5] in conformity with the Commission's Rules.[6]

5. In view of the fact that no other expressions of interest in the use of Channel 252C3 at Bethel were received, we have authorized, *infra*, a modification of petitioner's construction permit for Station KBTB(FM) to specify operation on Channel 252C3 in lieu of Channel 300A. *See, Modification of FM and TV Station Licenses*, 98 FCC 2d 916 (1984), and § 1.420(g) of the Commission's Rules.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Bethel, Alaska	252C3, 261C3[7]

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit issued to Bethel Communications, Inc. for Station KBTB(FM), IS MODIFIED effective **June 1, 1990,** to specify operation on Channel 252C3 in lieu of Channel 300A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice*, issued in MM Docket No. 89-133, *et al.*, proposed to amend the FM Table of Allotments for 149 Class A FM stations at various locations throughout the United States and territorial possessions by reclassifying their operations from a Class A to Class C3, and proposed modifications of each stations' authorization accordingly.

[2] Public Notice of the counterproposal was given August 30, 1989, Report No. 1793.

[3] The FAA's comments addressed all of the communities under consideration as a whole, rather than denoting specific areas of concern. They were not served on the individual par-

ties. Therefore, those comments violate the Commission's *ex parte* rules, and will not be considered as a separate filing in this proceeding. *See* 47 CFR § 1.1200, *et seq*.

[4] The FAA's letter was appended to petitioner's comments and is independent of that Administration's separate filing, as discussed in footnote 3, *supra*.

[5] Coordinates used for Channel 252C3 at Bethel are 60-47-06 and 161-47-54.

[6] Because this allotment is made as a result of a proposal announced prior to October 2, 1989, the minimum distance separation requirements are based on the provisions of § 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[7] Channel 261C3 was substituted for Channel 261A and the license for Station KYKD(FM) modified accordingly by *Report and Order* adopted February 22, 1990, in MM Docket No. 89-133.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-437

In the Matter of

Amendment of Section 73.202(b), RM-6803
Table of Allotments,
FM Broadcast Stations.
(Jackson, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 20, 1990; Released: April 17, 1990

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 7102 (1989), issued in response to a petition filed on behalf of Radio Station WHOD, Inc. (petitioner), licensee of Station WHOD(FM), Jackson, Alabama, proposing the substitution of Channel 233C3 for Channel 233A,[1] and modification of its license to specify operation on the higher-powered channel.[2] Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 233C3 can be allotted to Jackson, Alabama, at the petitioner's present site,[3] consistent with the minimum distance separation requirements of the Commission's Rules.[4]

3. In view of the above, we believe the public interest would be served by substituting Channel 233C3 for Channel 233A at Jackson, Alabama, since it could provide an expanded coverage FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station WHOD(FM) to specify operation on Channel 233C3 in lieu of Channel 233A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 1, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Jackson, Alabama	233C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license issued to Radio Station WHOD, Inc. for Station WHOD(FM), Jackson, Alabama, IS MODIFIED effective **June 1, 1990,** to specify operation on Channel 233C3 in lieu of Channel 233A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner is presently operating on Channel 285A. However, it was ordered to relocate to Channel 233A to accommodate the modification of Station WKKY(FM), Moss Point, MS. *See* 4 FCC Rcd 1185 (1989).

[2] Petitioner has also filed a proposal for modification of Station WHOD(FM) to specify operation on Channel 233C2. However, that proposal is mutually exclusive with a proposal to allot Channel 232C2 to Ellisville, MS, (RM-6799), at coordinates 31-36-12 and 89-12-00, and therefore, it will be considered in the context of the Ellisville proceeding.

[3] Coordinates at the petitioner's present site are 31-32-38 and 87-52-30.

[4] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 17, 1990

LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

Several local exchange carriers (LECs) filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs for the quarter ended March 30, 1990. Listed below are the names of the LECs that filed revisions and the file number assigned to each revision.

Ameritech Operating Companies	AAD 90-2
Southwestern Bell Telephone Company	AAD 90-3
US West, Inc.	AAD 90-4
Bell Atlantic	AAD 90-5
NYNEX Telephone Companies	AAD 90-6
Cincinnati Bell Telephone Company	AAD 90-7
BellSouth Corporation	AAD 90-8
Rochester Telephone Corporation	AAD 90-9
Southern New England Telephone Company	AAD 90-10
United Telephone System	AAD 90-11
Pacific Bell	AAD 90-12
Nevada Bell	AAD 90-13

Parties may file comments on the proposed revisions to the cost manuals no later than **May 15, 1990.** Replies should be filed by **May 30, 1990.** Comments should reference the applicable AAD file number listed above. A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VINCENT L. HOFFART FOIA Control No. 89-179

On Request for Inspection of
Records

MEMORANDUM OPINION AND ORDER

Adopted: April 3, 1990; Released: April 17, 1990

By the Commission:

1. Before the Commission is an Application for Review filed by Vincent L. Hoffart, seeking review of an initial ruling by James Warwick, Inspector General (IG), entered on November 15, 1989, which denied, in part, Mr. Hoffart's Freedom of Information Act request. *See* 5 U.S.C. § 552(b). Mr. Hoffart sought disclosure of investigative and licensing records relating to Kaye-Smith Enterprises, Inc. (Kaye-Smith), former licensee of stations KISW(FM), Seattle, Washington and KJRB-AM, Spokane, Washington.

2. On appeal, Mr. Hoffart first requests review of the IG's disclosure to Mr. Hoffart of a Certified Index for FCC Docket No. 82-265. Mr. Hoffart had sought a copy of the Index as filed with the Commission in *Hoffart Broadcasting v. FCC*, No. 85-1266 (April 16, 1986), with notations recording the filing of certain exhibits by Kaye-Smith. The IG provided Mr. Hoffart with a copy of the Index as filed with the court, but lacking the notations, and informed Mr. Hoffart that the Index did not contain any such notations. Mr. Hoffart reiterates his request for the Index containing the notational entries.

3. Contrary to Mr. Hoffart's assertion, no entries reflecting the filing of the Kaye-Smith's exhibits were found in the Certified Index. Commission practice has been to submit to a reviewing court as part of a certified index only those pleadings and other documents recorded on the docket cards of a particular proceeding. Exhibits are not listed on the docket cards from which a certified index is produced. Exhibits, however, are listed on separate transcript cards kept by the Dockets Branch. A copy of the relevant portion of the transcript cards compiled in the Kaye-Smith proceeding will be released.

4. Next, Mr. Hoffart asks that we provide a copy of the license issued to Kaye-Smith describing the type of antenna that we authorized for Translator Station K283AA in response to Kaye-Smith's application for a change in operations. The IG informed Mr. Hoffart that station K283AA's license issued to Kaye-Smith did not contain a description of the antenna authorized for the station. The Commission has previously informed Mr. Hoffart that the license he seeks reflecting such information does not exist. *See* letter to Vincent L. Hoffart from James C. McKinney, Chief, Mass Media Bureau, dated March 31, 1987 (FOIA Control No. 86-178), *aff'd, Vincent L. Hoffart*, 3 FCC Rcd 928 (1988); *see also* letter to Vincent L. Hoffart from Acting Chief, Mass Media Bureau, dated April 11, 1986 (FOIA Control No. 86-44). A renewed search of our records has revealed nothing to cause us to modify our earlier conclusions concerning this document.

5. Mr. Hoffart further requests copies of documents that he claims were referred to by a Commission official in a telephone conversation. The Commission official involved states that his telephone conversation with Mr. Hoffart merely informed him of the Mass Media Bureau's intention to avail itself of an extension of time in order to respond thoroughly to a FOIA request that Mr. Hoffart had filed. Our further search conducted pursuant to the instant appeal has revealed no additional documents responsive to the FOIA request.

6. Finally, Mr. Hoffart requests a copy of the recommended decision and accompanying memorandum that the General Counsel submitted to the Commission for action in his earlier FOIA appeal. The IG withheld these documents pursuant to the deliberative process privilege embodied in Exemption 5 of the FOIA. *See NLRB v. Sears, Roebuck, Co.*, 421 U.S. 132, 149 (1975). Mr. Hoffart now states that the documents are needed in order to support his charges of preferential treatment accorded to Kaye-Smith.

7. We uphold the determination of the IG to withhold the documents pursuant to the deliberative process privilege. Each document renders legal advice to decisionmakers and is predecisional in nature. As such, the documents qualify for protection under the privilege. *See Jordan v. Department of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978); *see also Vaughn v. Rosen*, 523 F.2d 1143-1144 (D.C. Cir. 1975). Release of either document could harm our decisionmaking processes by dampening the frank exchange of views by the staff and by confusing the public with exposure of predecisional considerations. *See Russell v. Department of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982). Accordingly, we find that the IG properly invoked Exemption 5 to protect the documents from disclosure. Segregable, factual portions of the documents will be made available, however.

8. Accordingly, for the reasons set forth above, IT IS ORDERED, That the Application for Review filed by Vincent L. Hoffart IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED. The Requestor may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

The Officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett, Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs — AAD 7-1671

MEMORANDUM OPINION AND ORDER ON REVIEW

Adopted: April 10, 1990; Released: April 17, 1990

By the Commission:

I. INTRODUCTION

1. In the *Bell Atlantic Compliance Order*,[1] the Common Carrier Bureau (the Bureau) conditionally approved the permanent cost allocation manual of the Bell Atlantic Telephone Companies (Bell Atlantic) for the separation of regulated and nonregulated costs. On February 9, 1989, Bell Atlantic filed an Application for Review requesting that this Commission review and reverse one aspect of the order dealing with the affiliate transaction rules. No oppositions were filed. For the reasons set forth herein, we deny Bell Atlantic's Application for Review.

II. BACKGROUND

2. Part 32 of this Commission's rules, the Uniform System of Accounts (USOA), sets forth the rules and procedures which carriers use to record in a comprehensive and systematic manner their costs and revenues. The USOA contains accounts that reflect functions performed in the course of providing products and services to customers, and carriers must place their costs and revenues in the specified accounts. In the *Joint Cost Order*,[2] this Commission adopted standards governing the methods telephone companies are to employ to apportion the costs in each account between regulated telephone services and nonregulated activities. [3] The regulated costs recorded in the USOA are then divided between interstate and intrastate operations pursuant to the jurisdictional separations procedures set forth in Part 36 of our rules.[4] We use the portion of the regulated costs that those procedures assign to interstate operations to determine the interstate revenue requirements of the carriers that we regulate on a rate-of-return basis.[5]

3. Our ultimate goal in relation to the system described above is to promote just and reasonable rates for services in the interstate jurisdiction. In the *Joint Cost Order*, we attempted to further this goal by establishing a system of accounting separation that inhibits carriers from imposing on ratepayers the costs and risks of nonregulated ventures. We found that transactions between carriers and their nonregulated affiliates presented special problems in this regard, and we adopted uniform rules that govern how carriers record their affiliate transactions in USOA accounts.[6] Generally, these rules require that, for federal accounting purposes, the cost of any affiliate transaction will equal either the costs the affiliate group incurs in connection with the transaction or the price non-affiliates would have paid in arms length transactions with the affiliate group.[7] The costs of these transactions, like other costs recorded in the USOA, are subject to this Commission's cost apportionment processes and, to the extent classified as regulated, to the jurisdictional separations process.

4. On August 10, 1987, pursuant to the requirements established in the *Joint Cost Order*, Bell Atlantic filed a cost allocation manual specifying the procedures it intended to use to apportion the costs recorded in USOA accounts between regulated and nonregulated activities. Bell Atlantic also described its transactions with nonregulated affiliates, and discussed how it intended to comply with the federal accounting requirements for these transactions. The Bureau reviewed and conditionally approved that manual in the *Bell Atlantic Order*,[8] subject to Bell Atlantic's filing certain revisions. Bell Atlantic submitted those revisions on March 14, 1988, and further revised its manual on June 30, 1988, and on September 30, 1988. In the *Bell Atlantic Compliance Order*, the Bureau found that Bell Atlantic's revisions generally cured the prior deficiencies, subject to the filing of a limited number of further revisions.

5. One area that the Bureau ordered Bell Atlantic to revise concerns the marketing service that Bell Atlantic Paging, Inc., (Bell Atlantic Paging) provides for the paging operations of Bell of Pennsylvania, Diamond State, and New Jersey Bell. In its revisions, Bell Atlantic proposed to record this marketing service in USOA accounts at "Competitive Rate[s]."[9] Bell Atlantic contended that the affiliate transaction rules adopted in the *Joint Cost Order* do not apply to these transactions because the jurisdictional separations process assigns all the costs of such transactions to the intrastate jurisdiction.

6. In the *Bell Atlantic Compliance Order*, the Bureau found that Bell Atlantic's proposal to record its costs related to Bell Atlantic Paging's marketing service at "Competitive Rate[s]" was inconsistent with the affiliate transaction rules. The Bureau determined that " . . . there is no exception to the affiliate transaction rules for transactions whose costs are assigned entirely to the intrastate jurisdiction."[10] The Bureau stated that those rules require carriers to record such services at either the nonregulated affiliate's fully distributed costs of providing the service, or if the services are also provided to nonaffiliated entities, at the market rate established through transactions between the provider of the service and third parties. The Bureau also stated that Bell Atlantic's cost accounting treatment of the marketing services provided by Bell Atlantic Paging to Bell Atlantic's paging operations was not entirely an intrastate matter, because those costs would affect the calculation of Bell Atlantic's marketing and general allocators, thereby affecting interstate ratepayers.[11] The Bureau ordered Bell Atlantic to revise its manual to conform to the rule.[12]

7. In response to the *Bell Atlantic Compliance Order*, Bell Atlantic filed the subject Application for Review. Bell Atlantic argues that the Bureau's requirement that Bell Atlantic apply the affiliate transaction rules in recording the costs of marketing services whose costs are all assigned to the intrastate jurisdiction conflicts with this Commission's *Joint Cost Order*, and thus should be reversed.[13]

8. Bell Atlantic raises three arguments to support its position. First, Bell Atlantic states that the Bureau's sole rationale for requiring Bell Atlantic to apply the affiliate transaction rules was the impact that the treatment of the marketing costs could have on interstate rates, since these costs would be incorporated into the calculation of Bell Atlantic's marketing and general allocators. Bell Atlantic argues that it is foreseeable that *all* costs assigned to the intrastate jurisdiction would have a similar impact on interstate rates, and that in any event the *Joint Cost Order* "left these costs subject to the Separations Manual, rather than the rules set forth in the Joint Cost Order."[14] Second, Bell Atlantic argues that, in the *Joint Cost Order*, we declined to preempt state regulation of affiliate transactions and, therefore, did not have to address whether we had the authority to preempt such regulation. Bell Atlantic argues that if we affirm the *Bell Atlantic Compliance Order*, we must now address whether we have authority to exercise jurisdiction over "intrastate matters."[15] Third, Bell Atlantic argues that it is unnecessary to apply the affiliate transaction rules to its transactions with Bell Atlantic Paging, because the reasonableness of those transactions should be left to the judgment of state regulators.[16]

III. DISCUSSION

9. We deny Bell Atlantic's Application for Review. That pleading is based on the incorrect assumption that the *Bell Atlantic Compliance Order* conflicts with the *Joint Cost Order*. There is no conflict in this regard. In the portions of the *Joint Cost Order* on which Bell Atlantic relies, we determined only that we should not require the states to use our federal cost apportionment procedures and affiliate transaction rules for intrastate regulatory purposes.[17] We did require, however, in other portions of the *Joint Cost Order*, that carriers comply with Section 32.27 of our rules, which sets forth the manner in which *all* carrier transactions with nonregulated affiliates are to be recorded in USOA accounts. This federal requirement applies prior to the cost apportionment and jurisdictional separations processes, and regardless of whether the jurisdictional separations process will ultimately assign the costs of the transactions to the intrastate jurisdiction.

10. Moreover, contrary to Bell Atlantic's claim, the *Bell Atlantic Compliance Order* does not improperly assert federal jurisdiction over "intrastate matters." In establishing a comprehensive system for recording all affiliate transaction costs in USOA accounts, we are fully within the scope of our jurisdictional powers. Section 220(a) of the Communications Act of 1934 gives us the power to "prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys."[18] The affiliate transaction rules were issued under this authority and in no way inhibit the states from exercising their power over intrastate matters. Indeed, as we stated in the *Joint Cost Order*, the states are free to employ their own "cost allocation methods and affiliate transaction rules in intrastate ratemaking, and to mandate that carriers keep any side records required for the states' regulatory purposes."[19]

11. In addition, we agree with the Bureau that even if the jurisdictional separations process assigns the costs at issue entirely to the intrastate jurisdiction, there is a federal interest in how the costs are recorded in the USOA. Bell Atlantic seeks to use "Competitive Rate[s]," rather than market rates or fully distributed costs, to record the marketing services that Bell Atlantic Paging provides certain Bell Atlantic operating companies. Approval of that proposal would change the dollar amount Bell Atlantic records in USOA accounts for the marketing of paging services, thereby changing the total amount of marketing costs Bell Atlantic records in those accounts. This change in total costs, in turn, would change Bell Atlantic's cost apportionment and jurisdictional separations results, and affect the total costs included in Bell Atlantic's interstate revenue requirement computations. Allowing carriers to employ their own methods, or state methods that might vary from jurisdiction to jurisdiction, to determine the costs to be recorded in USOA accounts could cause significant changes in the costs interstate ratepayers bear, because the costs recorded in any given USOA account may be used to apportion major cost categories between regulated and nonregulated activities.[20]

12. Finally, we disagree with Bell Atlantic's claim that application of the affiliate transaction rules to its transactions with Bell Atlantic Paging is unnecessary because judgment regarding the reasonableness of such transactions should be left to state regulators. Generally, absent a special showing in the form of a request for a waiver of the rules, an agency must abide by its rules. Bell Atlantic has not sought a waiver of the affiliate transaction rules, but has merely stated that the rules are unnecessary and therefore should not be applied to Bell Atlantic's transactions with Bell Atlantic Paging. This brief statement provides no basis for granting Bell Atlantic's petition.

IV. ORDERING CLAUSE

13. Accordingly IT IS ORDERED, pursuant to Section 4(i) and 5(c)(4) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 155(c)(4), that the Application for Review filed by the Bell Atlantic Telephone Companies IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Bell Atlantic Telephone Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 4 FCC Rcd 496 (Com. Car. Bureau)(*Bell Atlantic Compliance Order), recon. in part*, 4 FCC Rcd 4631 (Com. Car. Bureau 1989).

[2] Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987) (*Joint Cost Order), modified on recon.*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order), further recon.*, 3 FCC Rcd 6701 (1988), *aff'd* Southwestern Bell Corp. v. FCC, No. 87-1764 (D.C. Cir. Mar. 2, 1990).

[3] *See* 47 C.F.R. §64.901.

[4] 47 C.F.R. Part 36.

[5] *See* 47 C.F.R. Part 69.

[6] The affiliate transaction rules are codified in 47 C.F.R. §32.27.

[7] *See id.*

[8] Bell Atlantic Operating Companies' Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 109 (Com. Car. Bureau 1988)(*Bell Atlantic Order).*

[9] Bell Atlantic's revisions do not define "Competitive Rate[s]."

[10] *Bell Atlantic Compliance Order,* 4 FCC Rcd at 499, para. 32.

[11] *Id.* at 508, n.56.

[12] *Id.* at 499, para. 32.

[13] Bell Atlantic Petition at 2.

[14] *Id., citing Joint Cost Order,* 2 FCC Rcd at 1299-300, para. 3.

[15] Bell Atlantic Petition at 3 n.10, *citing Joint Cost Order,* 2 FCC Rcd at 1310, paras. 88-93.

[16] *Id.* at 3-4.

[17] *See Joint Cost Order,* 2 FCC Rcd at 1299-300, para. 3; *id.* at 1310, paras. 88-90.

[18] 47 U.S.C. §220(a) (1989).

[19] *Joint Cost Order,* 2 FCC Rcd at 1310, para. 90.

[20] For example, Bell Atlantic records certain of its marketing costs in Account 6611, Product management. The costs recorded in that account are included in a number of factors (such as total company wages and salaries, and the marketing and general allocators) that Bell Atlantic employs to apportion costs recorded in other accounts. If recording marketing services obtained from Bell Atlantic Paging at competitive rates, rather than at market rates or fully distributed costs, were to increase the total costs Bell Atlantic records in Account 6611, it would also increase the portion of those costs that are classified as regulated for federal accounting purposes and thereby increase the total amount of costs in other accounts that Bell Atlantic apportions to regulated activities. A subsequent assignment of excess costs recorded in Account 6611 to the intrastate jurisdiction would not eliminate this change in cost apportionment results for other accounts.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket 90-180

In re Applications of

KAREN S. KLEHAMER (hereafter "Klehamer") — File No. BPH-880629MK

WILLIAM J. KIMBLE (hereafter "Kimble") — File No. BPH-880630MA

CALCUTTA BROADCASTING CORPORATION (hereafter "Calcutta") (Previously Dismissed) — File No. BPH-880630MW

For Construction Permit
for a New FM Station on Channel 227A
(93.3MHz) in Avon, New York

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: April 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. On November 22, 1989, Calcutta filed a petition for reconsideration seeking reversal of the finding of October 24, 1989, by the FM Branch that the subject application was inadvertently accepted for tender. Kimble filed an opposition to petition for reconsideration on December 11, 1989. Specifically, Calcutta's application was found untenderable because the legal boundaries of the community of license are not clearly and legibly defined on the contour map. This information is required pursuant to Item 4g, Appendix D, *Report and Order* in Docket MM 84-750, 50 Fed Reg. 19936 (1985). The *Report and Order* indicates that the failure to provide this information will result in the application being returned as unacceptable for tender.

3. Calcutta argues that when its application was originally reviewed by the Commission's staff, it was determined that the application was tenderable. However, when the application was restudied for acceptability, it was determined that the contour map did not meet the provisions of Item 4g, Appendix D to the *Report and Order*. Calcutta states that the aeronautical sectional map used for purposes of indicating the proposed contours clearly and legibly defines the boundaries of Avon. Calcutta concedes that Avon appears on the map as a very small community, but that Avon's location was clearly identified by a label and an arrow. In light of these facts, Calcutta maintains that its application was improperly returned and should, therefore, be reinstated *nunc pro tunc*.

4. A petition for reconsideration must be based upon newly discovered evidence or upon errors of fact or law in the action for which reconsideration is sought. *See* 47 C.F.R. Sections 1.106(c) and (d). In the absence of such a showing, reconsideration will not be granted for the purpose of reviewing matters which the Commission has already considered and resolved. *WWIZ, Inc.*, 37 FCC 685,686 (1964), *affd. sub nom. Lorain Journal Co. v. FCC*, 351 F 2d 824 (D.C. Cir. 1965), *cert den.* 383 U.S. 967 (1966); *Employment Practices of Charlotte, North Carolina Stations*, 77 FCC 2d 1 (1980). Furthermore, in accordance with the *Report and Order, supra*, the only basis for reversing an earlier finding of untenderability is demonstration that the Commission erred in its earlier determination. *See* specifically, Appendix D to the *Report and Order, supra*.

5. We have examined the instant petition and determined that the Commission did not make an error in returning the Calcutta application as inadvertently accepted for tender. The contour map submitted with Calcutta's *original* application does not legibly indicate the boundaries for Avon. It does contain an arrow denominating the site location as a darkened smudge on the aeronautical map. However, this indicator does not make it clear that the community of license is fully encompassed by the 70 dBu contour. Without the boundaries of Avon being clearly indicated, or having a point on the map indicated as the community of license clearly within the 70 dBu contour, Calcutta's application could not be accepted for tender. Moreover, the Commission cannot determine if Calcutta's proposal complies with Section 73.315 of the Commission's Rules from the material submitted with the original application since the boundaries of the community of license are not indicated. Furthermore, the inclusion of a new, clearer, exhibit submitted with the petition for reconsideration contravenes the letter and spirit of the tenderability rules and requirements and, as such, will not be accepted. Accordingly, for the above stated reasons, the Calcutta petition will be denied.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Kimble have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Kimble would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Kimble would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That Calcutta's petition for reconsideration IS DENIED.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-179

In re Applications of

Ecola Broadcasting Company, Inc. (hereafter "Ecola") File No. BPH-880310ML

Seaside Broadcasting Corporation (hereafter "Seaside") File No. BPH-880310MN

For Construction Permit for a New FM Station on Channel 234A in Seaside, Oregon

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: April 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ecola.* Ecola is proposing to construct a new tower with effective radiated power (ERP) of 3 kW (H&V) and center of radiation above ground height of 15 meters. Seaside is proposing to increase the height of an existing tower with ERP of 3kW (H&V) and center of radiation above ground height of 200 meters. An engineering study based upon OST Bulletin No. 65, October 1985 entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency ("RF") Radiation" reveals that the ANSI limit of one milliwatt per square centimeter may be significantly exceeded in the areas immediately surrounding the applicants' respective tower bases. Accordingly, Ecola and Seaside are required to amend their applications within 30 days of the date of this Order to demonstrate compliance with the RF radiation guidelines. The showing must include the total contribution of radiation from all radiofrequency sources on and in the immediate vicinity of the applicants' towers. Since the proposals of Ecola and Seaside may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Ecola and Seaside are required to submit the environmental impact information described in 47 C.F.R. §1.311. Accordingly, Ecola and Seaside will be required to file, within 30 days of the release of this Order, an environmental assessment with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub non Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

3. *Seaside.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement disclosing the manner in which the station's EEO policy will be communicated to employees and prospective employees. In addition, applicant must supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Seaside has not filed such a statement concerning its policy dissemination. Although Seaside has filed such a statement concerning its recruitment of minorities, it is deficient. Seaside has not listed a women's organization. Accordingly, Seaside will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

4. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Seaside has not completed Item 4 correctly. Seaside's application gives a post office box number as the residence address for Samual Kirkaldie and Albert Karge. Accordingly, Seaside must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

5. *Other Matters.* Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Ecola and Seaside in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, Ecola and Seaside shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Seaside shall submit Sections III and VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That Seaside shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board — **CC DOCKET NO. 80-286**

Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands — **CC DOCKET NO. 83-1376** RM 4436

ORDER

Adopted: April 9, 1990; Released: April 18, 1990

By the Commission:

1. Pursuant to Section 410(c) of the Communications Act, 47 U.S.C. §410(c), we hereby appoint Federal Communications Commissioner Ervin S. Duggan to be a member of the Federal-State Joint Boards in CC Docket Nos. 80-286 and 83-1376. This appointment fills the positions recently vacated by Commissioner James H. Quello. Henceforth a copy of all filings in these proceedings shall be served on Commissioner Duggan at the following address:

The Honorable Ervin S. Duggan, Commissioner
Federal Communications Commission
1919 M Street, N.W.
Room 832
Washington, D.C. 20554

2. Accordingly, IT IS ORDERED that the Honorable Ervin S. Duggan shall serve as a member of the Federal-State Joint Boards in CC Docket Nos. 80-286 and 83-1376.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-34

In the Matter of

Amendment of Part 90 of the Commission's Rules to Permit The Short-Spacing of Specialized Mobile Radio Systems Upon Concurrence from Co-Channel Licensees	RM-6666

ORDER EXTENDING COMMENT PERIOD

Adopted: April 12, 1990; Released: April 18, 1990

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On February 28, 1990, the Commission adopted a *Notice of Proposed Rule Making* (*Notice)* in the above captioned matter. The specified deadlines for comments and reply comments were April 23, 1990 and May 8, 1990, respectively.

2. On April 6, 1990, the American SMR Network Association (ASNA) filed a motion asking us to permit it to file comments ten days later than the established deadline. ASNA, the original proponent of this rule making, states that its members are the parties primarily affected by the Commission's proposal and that its Board of Directors needs to formulate ASNA's position on several issues raised in the *Notice*. ASNA's Board is not scheduled to meet until April 23, 1990, the date that comments would otherwise be due.

3. We recognize the importance of ASNA's participation to the development of a complete record in this proceeding and, in light of the circumstances presented, find that good cause exists for the extension of time requested. To afford interested parties a full opportunity to participate in this proceeding we will extend the due dates of all comments and reply comments by ten days.

4. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, that all interested parties will have until **May 3, 1990** to file comments and until **May 18, 1990** to file reply comments.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave
Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-142

In re Applications of

John Morris and Lawrence R. Baker d/b/a MORBAK COMMUNICATIONS (hereafter "Morbak") — File No. BPH-880615MG

OHIO NORTHERN UNIVERSITY (hereafter "ONU") — File No. BPED-880616ML

For Construction Permit for a New FM Station on Channel 235A (94.9 MHz) in Ada, Ohio

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *ONU.* All non-commercial FM stations operating in the commercial band (Channels 221 through 300), with the exception of Class D stations are subject to the same engineering rules as commercial stations and must provide the same engineering data required of commercial applicants. *See Report and Order*, in MM Docket 84-750, Fed. Reg. 19936 (May 13, 1985). Item 4 (g) of Appendix D to the *Report and Order* requires applicants to submit a map which clearly and legibly shows the 60 and 70 dBU contours and the legal boundaries of the community of license. Figure 5 of ONU's application provides a map with the requisite 60 dBU contour. However, since the data for the 70 dBU contour, as well as the boundaries of the community of license, were not plotted on the map, we cannot determine whether the city grade coverage requirement of Section 73.315(a) of the Commission's rules has been met. In view of the fact that FCC Form 340 does not require applicants to submit the 70 dBU contour, this is neither a tenderability nor an acceptability defect. Therefore, ONU will be allowed to amend its application to correct this deficiency. Accordingly, ONU will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days after this Order is released.

3. Morbak petitioned for leave to amend its application on June 30, 1989, and October 2, 1989. The accompanying amendments were filed after October 7, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That ONU shall submit a corrective amendment as required by paragraph 2 above, to the presiding Administrative Law Judge within 30 days after this Order is released.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Morbak ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-158

In re Applications of

HE'S ALIVE INCORPORATED (hereafter "HAI") — File No. BPED-880616MO

James J. Humes d/b/a HUMES BROADCASTERS (hereafter "Humes") — File No. BPH-880616MT

Tom Clark, Jr. and John Sebeck t/a TJ BROADCASTING (hereafter "TJ") — File No. BPH-880616NA

MT. VERNON BROADCASTING, INC. (here after "Mt. Vernon") — File No. BPH-880616NC

For Construction Permit 235A (94.9 MHz) for a New FM Station on Channel in Oliver, Pennsylvania

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 18, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *TJ.* Section II Item I, FCC Form 301, appears to be incorrect. The information in the application indicates that the applicant is a partnership. In fact, the applicant's response to Section II, Item 3, indicates that the applicant may be a limited partnership. Moreover, TJ's answers to Section II, Item 4, questions 3 through 6 for each principal to the application, are not appropriate. The requisite information is applicable to each party to the application. Accordingly, TJ will be required to submit a corrective amendment which contains the information requested in Section II, Items 1, 3, and 4, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

3. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That TJ shall submit a corrective amendment pursuant to paragraph 2, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

7. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Petition of the New York Telephone Company for a Declaratory Ruling with Respect to the Physically Intrastate Private Line and Special Access Channels Utilized for Sales Agents to Computer New York State Lottery Communications

ORDER

Adopted: April 6, 1990; Released: April 9, 1990

By the Chief, Common Carrier Bureau

1. On April 3, 1989, New York Telephone Company (NYT) filed a motion for extension of time. NYT requests that the date for filing oppositions to the petitions for reconsideration in this proceeding be extended from April 10, 1990 to April 16, 1990.[1] NYT states that it will be necessary for NYT to access historical records, in order to address some of the issues raised in the reconsideration petitions. Thus, NYT requests an additional six days in which to prepare its opposition. NYT states that the parties involved in this proceeding have been contacted and have no objection to an extension.

2. Although it is the policy of the Commission that extensions of time shall not be granted routinely,[2] we believe that the public interest in the development of a full and complete record in this proceeding would be served by allowing additional time for the filing of oppositions. Therefore, we conclude that it is appropriate to extend the date for filing oppositions to petitions for reconsideration to April 16, 1990, as requested.

3. Accordingly, IT IS HEREBY ORDERED that the Motion for Extension of Time filed by the New York Telephone Company IS GRANTED, [3] and that oppositions in this proceeding are due on or before **April 16, 1990**.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In the Matter of the Petition of the New York Telephone Company for a Declaratory Ruling with respect to the Physically Intrastate Private Line and Special Access Channels Utilized for Sales Agents to Computer New York State Lottery Communications, 5 FCC Rcd 1080 (1990).

[2] Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[3] Pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 155(c), and authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Waiver of Certain Reporting
Requirements of Annual Reports
Form O and Form R.

ORDER

Adopted: April 9, 1990; Released: April 12, 1990

By the Chief, Common Carrier Bureau:

1. Sections 1.785 and 43.21 of the Commission's Rules, 47 C.F.R. §§ 1.785 and 43.21, require wire-telegraph, ocean-cable and radiotelegraph carriers having annual operating revenues in excess of $50,000 to file annual reports with the Commission not later than March 31 of each year, covering the preceding calendar year. In an order adopted March 22, 1990 we extended the filing date for the 1989 Form O and Form R to April 30, 1990.[1] The Annual Report Form O is required from wire-telegraph and ocean-cable carriers,[2] and the Annual Report Form R is required from radiotelegraph carriers.[3]

2. In a petition dated February 14, 1990, Western Union Corporation (Western Union) requests a waiver of the Commission's Rules, Sections 1.785(a) and 43.21, which require it to file the Annual Report Form O. Western Union states that the market in which it operates has significantly changed and that, as applied to it, certain Form O reporting requirements are outdated, unnecessary and unduly burdensome and therefore should be waived. In addition, Western Union asserts, the Commission may wish to go further and eliminate the broader accounting and reporting requirements applicable to Western Union, because these requirements serve little purpose and do not advance the Commission's statutory mandate to promote competitive markets under Section 222(b)(1) of the Communications Act of 1934, as amended.

3. Western Union provides a comprehensive list of specific Form O schedules it wants waived for the 1989 report. In addition, Western Union sets forth the Balance Sheet and Income Statement information it proposes to furnish the Commission for calendar year 1989 in lieu of the Form O information currently provided.

4. The Bureau sought public comment on Western Union's petition.[4] Only TRT/FTC Communications, Inc. (TRT/FTC) filed comments in response to the Bureau's request for comments. TRT/FTC states that Western Union has described industry-wide conditions and, accordingly, the present accounting and reporting rules applicable to all record carriers should be revised and substantially eliminated. TRT/FTC opposes the grant of a waiver of the annual report requirements for Western Union alone, stating that that would constitute uneven regulation of the record carriers, all of which have been classified non-dominant.[5] However, TRT/FTC supports Western Union's suggestion that a general Rule Making be instituted looking toward a modification of Parts 34 and 35 of the Rules to eliminate unnecessary and outdated reporting requirements for all record carriers.

5. We have completed an analysis of the 1988 Forms O and R and we conclude that only the schedules listed below are needed for 1989:

Schedule	Name
1	Identity of Respondent
2	Board of Directors
4	Control over Respondent
5	Security Holders and Voting Rights
6	Elections
7	Organizations Controlled by Respondents
9	Contingent Liabilities of Respondents
100	Comparative Balance Sheet - Asset Side
200	Comparative Balance Sheet - Liability Side
300	Income and Earned Surplus Statement
301	Operating Revenues (301T-C for Wire-Telegraph and Ocean-Cable or 301R for Radiotelegraph)
330	Operating Expenses (330T-C for Wire-Telegraph and Ocean-Cable or 330R for Radiotelegraph)
414	Changes During the Year Signature Page

We conclude that, under the circumstances presented by the parties with respect to 1989, waiver of the reporting requirements contained in the other schedules would significantly reduce reporting burdens without depriving the Commission of essential information.

6. We believe that any relief granted to Western Union should also be granted to other record carriers. Therefore, we are granting a waiver of the reporting requirements as described above for all carriers filing 1989 Annual Reports Form O and Form R.

7. Accordingly, in view of the foregoing, IT IS ORDERED, pursuant to Sections 0.91(a), 0.291 and 1.3 of the Commission's Rules, That the reporting requirements of Annual Reports Form O and Form R as described above, are hereby waived for the 1989 reports only.

8. IT IS FURTHER ORDERED, That Western Union Corporation's petition for waiver of the annual reporting requirements for wire-telegraph, ocean-cable and radiotelegraph carriers is granted to the extent set herein, and is otherwise denied.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Extension of Filing Date for Annual Reports Form O and Form R, DA 90-491, released March 23, 1990.

[2] Carriers that reported on Form O for 1988 were FTC Communications, Inc.; Western Union International, Inc.; and Western Union Corporation.

[3] Carriers that reported on Form R for 1988 were RCA Global Communications, Inc.; TRT Telecommunications Corporation; and U.S. Liberia Radio Corporation.

[4] Western Union Corporation's Petition for Waiver of Reporting Requirement of Annual Report Form O, News Release, Mimeo No. 2006, March 1, 1990.

[5] Common Carrier Services, CC Docket No. 79-252, Fourth Report and Order, 95 FCC 2d 554 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-215

In the Matter of

Amendment of Part 32, Uniform System of Accounts for Telecommunications Companies, to Revise the Accounting for General Purpose Computer and Information Management Expenses

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1990; Released: April 10, 1990

By the Commission:

I. INTRODUCTION

1. In this Notice of Proposed Rule Making (NPRM), the Commission is proposing to amend Part 32, Uniform System of Accounts for Telecommunications Companies (USOA),[1] to eliminate two expense accounts, Account 6124, General Purpose Computers Expense,[2] and Account 6724, Information Management [3] and reclassify these expenses to other expense accounts. The Commission believes elimination of these accounts will improve uniformity of accounting among the carriers and produce accounting information that is more useful for our regulatory purposes.

II. DISCUSSION

2. Our audits of the costs recorded in these accounts and our experience with data reported by carriers under our Automated Reporting and Management Information System (ARMIS) have revealed inconsistencies among the carriers in recording costs in these accounts. Carriers are having great difficulty in distinguishing personnel whose principal job is the physical operation of computers (Account 6124) or the development and maintenance of data bases (Account 6724) from personnel involved in the preparation of input data and the use of outputs. For example, some carriers with general purpose computers solely dedicated to specific activities are assigning expenses to those activities, while others are classifying them in Accounts 6124 and 6724. In other cases we have noted, classification differences for like costs occur in varying degree when general purpose computers are engaged in serving a multitude of activities. As a result, costs for activities supported by general purpose computers and information management expenses are in some cases understated and in other cases they may be overstated.[4] Thus, the data are not comparable. Judging from the amounts reported in Accounts 6124 and 6724 these expenses are significant.[5]

3. Moreover, even if these inconsistencies did not exist, separate reporting of general purpose computer and related expenses in Accounts 6124 and 6724 is not very useful for regulatory purposes. In particular, Accounts 6124 and 6724 do not provide the Commission with an accurate picture of the costs of the activities being served by the computers. An assessment of the costs of such activities, among others, would contribute to the development of cost causative rates.

4. Because of the existing inconsistencies in the accounting for general purpose computer and information management expenses and because separate reporting of costs recorded in these two expense accounts is not very useful for regulatory purposes, we believe a revision of Part 32 would be appropriate. In order to improve the accounting for these expenses the Commission is proposing to eliminate Accounts 6124, General Purpose Computers Expense, and 6724, Information Management, from the USOA and thereby require carriers to classify the computer and information management expenses now recorded in these accounts with the activities they serve. For example, general purpose computer expenses related to customer services would be classified to Account 6623, Customer Services, and general purpose computer expenses related to payroll processing would be classified to Account 6721, Accounting and Finance. The Commission tentatively concludes that the changes proposed here are more in line with the overall objective of the USOA to achieve, to the extent practicable, a more accurate reflection of functions performed in the provision of telecommunications services, and that the changes will produce more uniform reporting of operations than is currently the case.[6]

5. The proposal here would not preclude carriers from establishing clearing accounts pursuant to 47 C.F.R. Section 32.5999(f)(5) for the accumulation of these expenses prior to recording them in the appropriate expense account. Nor would it affect plant asset Account 2124, General Purpose Computers. This account would continue to contain the investment in those computers and peripheral devices that are capable of multi-purpose functions and serve a variety of support purposes.[7]

III. PAPERWORK REDUCTION ACT

6. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed in the Act.

IV. REGULATORY FLEXIBILITY ACT

7. The Commission certifies that the Regulatory Flexibility Act[8] is not applicable to the rule changes the Commission is proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this *Notice* in the Federal Register. As part of our analysis of the proposal described in this *Notice*, however, the Commission has considered the impact of the proposal on small telephone companies, *i.e.*,

those serving 50,000 or fewer access lines.[9] The action proposed herein, if eventually adopted in a final rule, is expected to have a minimal impact on small carriers.

V. EX PARTE CONTACTS

8. For purposes of this nonrestricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in this matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

9. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

VI. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, That pursuant to Sections 1, 4(i), 4(j), 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j), 201-205, 218, 220, and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. Sec. 553, notice is hereby given of proposed amendments to Part 32 of the Commission's Rules, 47 C.F.R. Part 32, as shown in the Appendix. The Commission hereby gives notice that in reaching our decisions in this proceeding the Commission will not necessarily be limited to the comments and reply comments that may be filed, and that the Commission may utilize other information, analyses, and reports, provided that in each such case a copy of the material relied upon will be associated with the record of this proceeding.

11. IT IS FURTHER ORDERED, That interested persons may file comments on the specific proposals discussed in this *Notice* on or before May 10, 1990. Reply comments shall be filed on or before May 25, 1990. In accordance with the provisions of Section 1.419 of the Commission's Rules and Regulations, 47 C.F.R. Section 1.419, an original and five (5) copies of all comments shall be furnished to the Commission. Copies of the comments will be available for public inspection in the Commission's Docket Reference Room, 1919 M Street, N.W., Washington, D.C.

12. IT IS FURTHER ORDERED, That the Secretary shall serve a copy of this Notice of Proposed Rule Making on state regulatory commissions.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 32, Uniform System of Accounts for Telecommunications Companies, is proposed to be amended as follows:

1. The authority citation for Part 32 continues to read as follows: Authority : Sec. 4(i), 4(j), and 220 as amended; 47 U.S.C. 154(i), 154(j), and 220 unless otherwise noted.

2. The index to Part 32 is amended to delete Section 32.6124 and Section 32.6724 to read as follows:

PART 32 - UNIFORM SYSTEM OF ACCOUNTS FOR TELECOMMUNICATIONS COMPANIES

* * * * *

Subpart E - Instructions for the Expense Accounts

* * * * *

32.6123 Office equipment expense.
32.6210 Central office switching expenses.

* * * * *

32.6723 Human resources.
32.6725 Legal.

* * * * *

3. Section 32.5999 is amended by revising paragraph (h) to delete the listing of Accounts 6124 and 6724 as follows:

§32.5999 General.

* * * * *

(h) Expense accounts to be maintained.

Account title	Class A Account	Class B Account
* * * * *	* * *	* * *
Office equipment expense	1 6123	
Central office switching expense	1 2 6210	6210
* * * * *	* * *	* * *
Human Resources	1 6723	
Legal	1 6725	
* * * * *	* * *	* * *

* * * * *

1 SUBSIDIARY RECORD CATEGORIES REQUIRED IN ACCORDANCE WITH SECTION 32.5999(f).

2 To be used by Class A telephone companies to summarize accounts for reporting purposes.

4. Sections 32.6124 and 32.6724 are removed in their entirety.

FOOTNOTES

[1] 47 C.F.R. Part 32.

[2] Section 32.6124, General Purpose Computers Expense, states that this account shall include costs of personnel whose principal job is the physical operation of general purpose computers and the maintenance of operating systems. This excludes the cost of preparation of input data or the use of outputs which are chargeable to the accounts appropriate for the activities being performed. Also excluded are costs incurred in planning, developing, testing, implementing, and maintaining data bases and application systems for general purpose computers.

[3] Section 32.6724, Information Management, states that this account shall include costs incurred in planning, developing, testing, implementing and maintaining data bases and application systems for general purpose computers.

[4] Among operating companies of the seven Regional Holding Companies the ratio of General Purpose Computers Expense to total operating expenses ranged from a low of 2.31% for the Pacific Telesis Companies to a high of 4.33% for the NYNEX Companies. For NYNEX 1% of total operating expenses is approximately $81 million. The Information Management Expense to total operating expenses ratio ranged from a low of 1.92% for Southwestern Bell to a high of 3.84% for the U S West Companies. For the U S West Companies 1% of total operating expenses is approximately $59 million.

[5] For calendar year 1988, carriers subject to our Automated Reporting and Management Information System (ARMIS) reported $1.9 billion in expenses in the General Purpose Computers Expense account and $1.6 billion in the Information Management Expense account.

[6] The changes proposed here, if ultimately adopted as a final rule, would require carriers to file revisions to their Cost Allocation Manuals filed in accordance with Part 64 of the Commission's Rules.

[7] The USOA excludes from the description of Account 2124, General Purpose Computers, the original cost of computers and peripheral devices and their initial operating system software when they are used in connection with switching, network signaling, network operations or other specific telecommunications plant. In such circumstances, these items are recorded with the other assets that perform those functions. (*See* 47 C.F.R. Section 32.2124(d)).

[8] 5 U.S.C. §§601 *et. seq.* (1987).

[9] Because of the nature of local exchange and access service, the Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, the Commission is not required by the terms of that Act to apply the formal procedures set forth therein. The Commission is nevertheless committed to reducing the regulatory burdens on small telephone companies wherever possible consistent with our other public interest responsibilities. Accordingly, the Commission has chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy and Rules Concerning Rates for Dominant Carriers — **CC Docket No. 87-313**

In the Matter of

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers — **CC Docket No. 89-624**

ORDER

Adopted: April 10, 1990; Released: April 11, 1990

By the Chief, Common Carrier Bureau:

1. Several parties have filed a motion requesting an extension of the current April 27, 1990, filing date for comments established in the Supplemental Notice of Proposed Rule Making.[1] On March 30, 1990, Ad Hoc Telecommunications Users Committee, Aeronautical Radio, Inc., Allnet Communication Services, Inc., American Petroleum Institute, American Telephone and Telegraph Company, Consumer Federation of America, District of Columbia People's Counsel, Electronic Data Systems Corporation, Independent Data Communications Manufacturers Association, International Communications Association, Maryland People's Counsel, MCI Telecommunications Corporation, National Association of State Utility Consumer Advocates, Ohio Consumers' Counsel and Tele-Communications Association (Joint Parties) filed a joint motion requesting an extension of 30 days, to May 29, 1990. On April 5, 1990, the United States Telephone Association (USTA) filed an opposition to the motion of the Joint Parties. On April 9, 1990 Pacific Bell and Nevada Bell (Pacific) and Southwestern Bell Telephone Company (SWBT) filed oppositions to the motion.

2. The Joint Parties state that the current filing schedule for price caps is inadequate in light of the volume of data and the complexity of issues to be analyzed in that proceeding, along with the overlapping filing schedule in CC Docket 89-624. In particular, they say, those Joint Parties with small or nonexistent staff and limited resources to devote to outside counsel and consultants, are not in a position to review the technical appendices released with the *Supplemental Notice* concerning carrier productivity in the time period given. USTA and others reply that an extension of time is unnecessary because there are no unanticipated issues in the present comment round and because an extension of time could jeopardize the target implementation date for price caps.[2]

3. It is the policy of the Commission that extensions of time shall not be routinely granted. [3] However, in light of the significant issues in the above captioned proceedings and the volume of the staff studies and underlying data in appendices to the Supplemental Notice that require detailed economic analysis, we believe that a limited extension of time for filing comments is appropriate.[4] Particularly since the issues in the Supplemental Notice are an outgrowth of the ongoing price caps proceeding with which the parties have developed substantial familiarity and expertise, though, and based on the public interest in prompt resolution of the remaining issues, grant of a lengthy extension of time as requested is not warranted.

4. We grant in part the motion and extend the due date for filing comments to May 7, 1990. We also recognize that parties may want to coordinate their price cap filings with their filings in CC Docket 89-624 that address selection of earnings levels and other parameters associated with the automatic stabilizer and sharing device. Therefore, anticipating such requests and to allow parties to plan now for those filings, we on our own motion also extend the scheduled filings dates in CC Docket 89-624 to permit such coordination. The adjustments to the filing dates are provided in the Appendix to this Order.

5. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 4(j) and 5(c) of the Communications Act of 1934, 47 U.S.C. §§ 154(j), 155(c), and the authority delegated thereunder pursuant to Sections 0.91 and 0.291 of the Commissions Rule, 47 C.F.R. §§ 0.91, 0.291, that the joint motion of Ad Hoc Telecommunications Users Committee, Aeronautical Radio, Inc., Allnet Communication Services, Inc., American Petroleum Institute, American Telephone and Telegraph Company, Consumer Federation of America, District of Columbia People's Counsel, Electronic Data Systems Corporation, Independent Data Communications Manufacturers Association, International Communications Association, Maryland People's Counsel, MCI Telecommunications Corporation, National Association of State Utility Consumer Advocates, Ohio Consumers' Counsel and Tele-Communications Association, described in paragraph 1 above, IS GRANTED IN PART to the extent indicated herein, and otherwise IS DENIED.

6. IT IS FURTHER ORDERED that the schedule of pleadings in the captioned proceedings ARE AMENDED as specified in the Appendix.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

APPENDIX
REVISED SCHEDULE OF PLEADINGS IN
CC DOCKET Nos. 87-313 AND 89-624
April 9, 1990

February 2, 1990	Notice of appearance
February 16, 1990	Initial carrier submissions
March 27, 1990	Responsive submissions
April 17, 1990	Carrier rebuttal submissions
April 17, 1990	Notice of Appearance
May 7, 1990	Price Cap Comments (87-313) Supplemental Submissions (89-624)
May 21, 1990	Replies to Supplemental Submissions (89-624)
June 8, 1990	Price Cap Replies (87-313)
July 2, 1990	Proposed Findings and Conclusions (89-624)
July 16, 1990	Reply Findings and Conclusions (89-624)

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Supplemental Notice of Proposed Rule Making, DA 90-89, released March 12, 1990. (Supplemental Notice).

[2] USTA Opposition at 2; SWBT Opposition at 4; Pacific Opposition at 3.

[3] *See* Section 1.46(a) of the Commission's Rules, 47 C.F.R. § 1.46(a).

[4] Given that we are granting an extension to permit parties to review in detail the appendices to the *Supplemental Notice*, we would not expect to grant further extensions of time on this basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-629

In the Matter of

Amendment of Section 73.202(b), RM-7031
Table of Allotments,
FM Broadcast Stations,
(LaFayette, Georgia)

ORDER DENYING REQUEST FOR EXTENSION OF TIME TO FILE REPLY COMMENTS

Adopted: April 4, 1990; Released: April 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a motion for extension of time to file reply comments in response to the *Notice of Proposed Rule Making*, 5 FCC Rcd 571 (1990), in the above-captioned proceeding. The deadlines for filing comments and reply comments are March 22, 1990, and April 6, 1990, respectively. In response to the *Notice*, a counterproposal was filed by Virginia Ann Sattler, proposing to allot Channel 274A at Lafayette, Georgia, in lieu of Channel 298A, and substitute Channel 254A for Channel 274A at Trenton, Georgia. RA-AD of Trenton, Inc. ("RA-AD") filed a request that the period to submit reply comments be extended to April 20, 1990. RA-AD contends that its counsel will be unable to devote his attention to the merits of Sattler's counterproposal in time for the April 6, 1990, reply comment deadline, due to hearing-related obligations.

2. Section 1.46(a) of the Commission's Rules states the Commission's policy that extensions of time shall not be routinely granted. RA-AD has not stated sufficient grounds for departure from Commission policy.[1]

3. Accordingly, IT IS ORDERED, That the Request for Extension of Time submitted by RA-AD, IS DENIED.

4. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, 1.45 and 1.46 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] If acceptable for filing, counterproposals are put on Public Notice, thereby initiating an additional 15 day comment period. Thus, if Sattler's counterproposal is accepted for filing, RA-AD could file reply comments in response to the Public Notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE TELEVISION ASSOCIATION OF MARYLAND, DELAWARE AND THE DISTRICT OF COLUMBIA, INC.; COMCAST CABLEVISION OF BALTIMORE COUNTY, INC.; HOWARD CABLE TV ASSOCIATES; PRESTIGE CABLE TV OF MARYLAND, INC.; SIMMONS COMMUNICATIONS COMPANY, L.P.; UNITED CABLE TELEVISION OF BALTIMORE, L.P.; AND UNITED CATV, INC.,
Complainants,

v. File No. PA-88-002

CHESAPEAKE & POTOMAC TELEPHONE COMPANY OF MARYLAND, INC.,
Respondent.

ORDER

Adopted: March 1, 1990; Released: March 6, 1990

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On March 10, 1988, Cable Television Association of Maryland, Delaware and the District of Columbia, Inc.; Comcast Cablevision of Baltimore County, Inc.; Howard Cable TV Associates; Prestige Cable TV of Maryland, Inc.; Simmons Communications Company, L.P.; United Cable Television of Baltimore, L.P.; and United CATV, Inc. filed a formal complaint against Chesapeake and Potomac Telephone Company of Maryland, Inc. ("C&P"). The complaint alleged certain statutory and regulatory violations associated with C&P's cable television makeready and inspection practices.

2. The parties to the above-captioned complaint have conducted discussions, including consultations with members of the Enforcement Division, aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies between the parties was reached. On January 30, 1990, counsel for the cable operators and C&P filed a joint motion seeking dismissal of the complaint with prejudice, approval of a Settlement Agreement, and entry of an order maintaining the Commission's continuing jurisdiction to enforce the terms of the Settlement Agreement subject, however, to the provisions of Part 10 of the Settlement Agreement. We are satisfied that such disposition will serve the public interest by eliminating the costs occasioned by further litigation and the expenditure of time and resources of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned complaint, to approve the Settlement Agreement, and to maintain the Commission's continuing jurisdiction to enforce the terms of the Settlement Agreement, subject to the provisions of Part 10 of the Settlement Agreement and 47 U.S.C. § 224, IS GRANTED.

FEDERAL COMMUICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-1

In the Matter of

Local Exchange Carrier Access
Tariff Rate and Earnings Levels

ERRATUM

Released: March 15, 1990

By the Chief, Common Carrier Bureau:

1. On February 28, 1990, the Common Carrier Bureau released an Order in the above-captioned proceeding. Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, Memorandum Opinion and Order, DA 90-317, released February 28, 1990. The Order is hereby corrected by deleting the last sentence in paragraph 1 and by revising the second sentence of paragraph 2 to read as follows:

> Nevada Bell argues that its current Common Line and Special Access rates will produce earnings that will not exceed the authorized 12 percent rate of return for the access period ending June 30, 1990, so it is likely to prevail on the merits of its reconsideration petition.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-93

In the Matter of

Investigation of Equal Access
Rate Elements Filed Pursuant
to Waivers of Part 69

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1990; Released: April 19, 1990

By the Commission:

I. BACKGROUND

1. On November 25, 1987, the Commission released an Order in the above-referenced investigation[1] directing the Bell Atlantic Telephone Companies (Bell Atlantic) to refund to their interexchange (IC) customers approximately $6.2 million collected through Equal Access Recovery Charge (EARC) rate elements during 1985.[2] In separate actions, the Common Carrier Bureau (Bureau) denied Bell Atlantic's request for stay of the *Refund Order* and the Commission denied Bell Atlantic's petition for reconsideration of the *Refund Order*.[3] Bell Atlantic did not seek reconsideration of the refund amount. Bell Atlantic, after filing its petition for reconsideration, also filed a letter with the Commission claiming that the data it had submitted in its direct case, filed in response to issues set forth in the *Designation Order*,[4] was erroneous, and asserted that it was liable to refund considerably less than the $6.2 million specified in the *Refund Order*. That letter did not formally seek reconsideration of the refund amount.

2. Noting that the *Refund Order* relied on the data submitted in Bell Atlantic's direct case, the Bureau directed Bell Atlantic to show cause why it should not be required to refund the full $6.2 million.[5] Bell Atlantic answered that, contrary to its original estimate of $4.3 million, it had actually collected $5.3 million from the EACR rate element, and that it had already refunded that amount to its IC customers.[6] In its *Order To Complete Refund*,[7] the Bureau found that Bell Atlantic failed to demonstrate that it was not required to refund the full amount specified in the Commission's *Refund Order*, and directed Bell Atlantic to refund its IC customers $6.2 million, including the estimated $900,000 which Bell Atlantic avers was not collected pursuant to EARC rate elements. On May 4, 1989, Bell Atlantic filed the instant application for review of the Bureau's *Order To Complete Refund*.

3. We have considered Bell Atlantic's application for review in light of the Commission's previous Orders and the proceedings leading to the Bureau's *Order To Complete Refund*. For the reasons discussed below, we deny Bell Atlantic's application.

II. APPLICATION FOR REVIEW

4. In support of its application for review and request to reverse the Bureau's *Order To Complete Refund*, Bell Atlantic raises a number of arguments. Bell Atlantic argues first that it cannot refund equal access charges which it never collected, and that to do so would be inconsistent with the Commission's ruling in the *Refund Order* which stated that any refund could not exceed revenues generated by equal access charges. Bell Atlantic next argues that its IC customers have already received refunds in the aggregate amount of $5.3 million, which represents the entire amount of equal access charges it collected during the period in question. Bell Atlantic further contends that of the $6.2 million ordered refunded, approximately $900,000 of that figure was actually collected from local switching rates which were prescribed by the Commission and therefore cannot be ordered refunded by the Bureau, citing *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932) and *MCI v. AT & T*, 85 FCC 2d 994 (1981).

5. Bell Atlantic also contends that the Bureau's only rationale for its *Order To Complete Refund* is that Bell Atlantic should have filed a petition for reconsideration of the original $6.2 million ordered refunded instead of the explanation it offered in its January 27, 1988, letter. According to Bell Atlantic, the Commission's calculation of the $6.2 million equal access charge revenues was based on factual error, and its January 27, 1988, letter attempted to correct that error. However, says Bell Atlantic, the Commission did not consider the letter in the *Reconsideration Order* as it should have, based upon the Commission's own precedent.

III. DISCUSSION

6. As an initial matter, the proper method of contesting a final Commission action is to file a timely petition for reconsideration. Therefore, as correctly noted in the Bureau's *Order To Complete Refund*, Bell Atlantic should have filed a petition for reconsideration of the refund amount within 30 days of the Commission's November 27, 1987, *Refund Order*. *See* Section 1.106(f) of the Commission's Rules, 47 C.F.R. § 1.106(f). By its own admission, Bell Atlantic did not begin reviewing its Carrier Access Billing System to determine the amount of the refund due each customer until December 28, 1987, the date it filed for reconsideration and stay of the *Refund Order*, approximately one month after the *Refund Order* was released. Application for Review at 3. The Bell Atlantic petition, while timely, did not request reconsideration of the amount of the refund, nor did Bell Atlantic's January 27, 1988, letter request that it be considered in connection with the reconsideration petition. Thus, Bell Atlantic's own negligence in submitting faulty data with its direct case, and its lack of due diligence to contest on a timely basis the amount of the refund as calculated by the Commission based on the allegedly faulty data, led directly to its refund liability totaling $6.2 million.

7. Bell Atlantic also argues that it was not required to raise the refund amount issue in its petition for reconsideration; rather, it contends, the Commission should have considered Bell Atlantic's January 27, 1988, explanation letter in the *Reconsideration Order*. Bell Atlantic relies on the Commission's action in the annual 1985 access tariff proceeding[8] in which letters, filed by carriers who had not filed petitions for reconsideration of a refund Order, were

considered by the Commission even though the letters were submitted after the filing period for reconsideration petitions had lapsed. Bell Atlantic's reliance on that case is misplaced. The carriers who filed letters in the 1985 access tariff proceeding all had initially filed correct and accurate information in their direct cases. Moreover, the letters those carriers filed merely requested clarification regarding their refund liabilities; they did not request reconsideraton of a refund amount.

8. Conversely, Bell Atlantic presented what it now alleges is inaccurate and misleading data in its direct case regarding its equal access revenues, and attempted to correct its alleged error by filing a letter which offered a *post hoc* explanation of the numbers in its direct case. It did not seek clarification or approval by the Commission regarding Bell Atlantic's theory of the scope of its refund obligation; rather, it merely informed the Commission of the theory of its refund liability. *Reconsideration Order*, 3 FCC Rcd at 6573 n.3. Therefore, Bell Atlantic is not situated similarly to the parties which by letter sought clarification of their refund liabilities as calculated by accurate information supplied in their direct cases. Accordingly, the letters filed in the 1985 access tariffs proceeding, and the manner in which the Commission treated those letters, are not relevant to this proceeding. *Cf. New Orleans Channel 20, Inc. v. F. C. C.*, 830 F.2d 361, 366 (D.C. Cir. 1987).[9]

9. Furthermore, the *Designation Order* language cited by Bell Atlantic,[10] which states that this Commission "may take into account information" not contained in the pleadings, provided that such information or a writing indicating the nature and source of such information is placed in the public file, is not relevant. That language means that such information may be considered in reaching a final decision. It does not mean that such information will be considered after a final order has been issued and the time for filing petitions for reconsideration on that issue has expired. Failure to enforce our procedural rules in these circumstances would permit, if not encourage, carriers to rely upon the opportunity for future corrections as a substitute for careful preparation of initial data submissions, thereby seriously disrupting the administrative process.

10. Bell Atlantic further argues that the Bureau's *Order To Complete Refund* is unlawful since it would require the refund of revenues collected pursuant to local switching rates which the Commission prescribed.[11] We reject this argument, however, as essentially a collateral attack on a final Commission Order. Bell Atlantic raised this same argument in its petition for reconsideration of the *Refund Order* and the Commission rejected it, reasoning that Bell Atlantic could have raised the argument in its direct case. In denying Bell Atlantic's petition the Commission noted that "[p]etitions for reconsideration are not granted for the purpose of altering our findings on the basis of matters that have already been fully considered and substantively settled," and "[r]econsideration is only appropriate if arguments and facts could not have been known at the time of the last opportunity for submission." *Reconsideration Order*, 3 FCC Rcd at 6572. Therefore, the Commission concluded that Bell Atlantic failed to demonstrate that the *Refund Order* was based on flawed reasoning, or incomplete review of the record. This argument, already rejected in the *Reconsideration Order*, will not be considered again and the *Arizona Grocery* and *MCI* cases cited by Bell Atlantic are inapposite.

11. As was correctly noted in the Bureau's *Show Cause Order* and *Order To Complete Refund*, the Commission properly relied on data in Bell Atlantic's direct case in calculating the revenues collected pursuant to the EARC rate element. Thus, when based on the record properly before us in this case, the Bureau's *Order To Complete Refund* does not require Bell Atlantic to refund revenues in excess of those it claimed to have collected via the EARC rate element.[12]

12. In sum, the record before us indicates that: (1) the *Refund Order* properly relied on the data in Bell Atlantic's direct case in calculating the revenues collected via the EARC rate element; and (2) Bell Atlantic's own negligence in submitting purportedly faulty data and its lack of due diligence to contest on a timely basis the amount of the refund in a petition for reconsideration are the causes of its refund liability totaling $6.2 million. Therefore, in light of all of these circumstances, we find that the Bureau's *Order To Complete Refund* only required Bell Atlantic to refund revenues which it claimed to have collected, and which Bell Atlantic was required to pay pursuant to a Commission order that had become final.

IV. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED that the application for review filed by the Bell Atlantic Telephone Companies IS DENIED.

14. IT IS FURTHER ORDERED that the Bell Atlantic Telephone Companies SHALL COMPLETE the refund of the remaining $900,000 to their interexchange carrier customers on a pro rata basis which reflects each customers' share of the partial refunds previously made by Bell Atlantic.

15. IT IS FURTHER ORDERED that Bell Atlantic SHALL REPORT to this Commission no later than 45 days after the release of this Order as to the parties, the amounts, and the dates of all refunds, *i.e.*, partial refunds as well as the remaining refunds herein ordered.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The investigation in Docket 85-93 focused on equal access revenues claimed to be necessary to recover the portion of 1985 equal access costs which were not reflected in the access rates that were effective at the time. The rates became effective subject to investigation to determine whether these additional revenues were necessary. The Commission indicated that if the additional revenues were not required to avoid a shortfall, the Commission might order refunds of the sums collected from these rate elements.

[2] Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Memorandum Opinion and Order, 2 FCC Rcd 7029 (1987) (*Refund Order*).

[3] *See* Investigation of Equal Access Rates Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Memorandum Opinion and Order, DA 88-14, released Jan. 13, 1988 (Com. Car.

Bur.); Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket No. 85-93, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 6572 (1988) (*Reconsideration Order*).

[4] Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, Order Designating Issues for Investigation, CC Docket No. 85-93, 1 FCC Rcd 158 (1986) (*Designation Order*).

[5] Investigation of Equal Access Rate Elements Filed Pursuant to Waivers of Part 69, CC Docket 85-93, Order To Show Cause, 3 FCC Rcd 3947 (Com. Car. Bur. 1988) (*Show Cause Order*).

[6] Bell Atlantic Answer to Order To Show Cause, filed July 7, 1988 (Bell Atlantic Answer).

[7] Investigation of Equal Access Rate Elements, CC Docket No. 85-93, Memorandum Opinion and Order, 4 FCC Rcd 2657 (Com. Car. Bur. 1989) (*Order To Complete Refund*).

[8] Annual 1985 Tariff Filings, CC Docket No. 86-125, Phase II, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 3959, 3963 (1989).

[9] That case held that the Commission was not required to accord similarly situated parties the same treatment if the cases cited for support were factually distinguishable and the Commission's action was taken in full conformity with its procedural and substantive obligations.

[10] Application for Review at 7 (citing *Designation Order*, 1 FCC Rcd at 160).

[11] Application for Review at 7 (citing Investigation of Access and Divestiture Related Tariffs and MTS Market Structure, CC Docket Nos. 83-1145, Phase I and 78-72, Phase I, 49 Fed. Reg. 23924 (1984) at para. 127).

[12] We note that the Bureau's *Order To Complete Refund* discharged Bell Atlantic of liability for interest on the refund amount because AT&T, the party requesting that interest be paid, failed to make that request in a timely filed petition for reconsideration. If such an obligation had been imposed on Bell Atlantic's $5.3 million payment, according to estimates in earlier filed pleadings, the interest amount would have exceeded the $900,000 at issue here. *See Order To Complete Refund*, 4 FCC Rcd at 2657.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-304

In re Application of

EDENS BROADCASTING, INC. (WRBQ-FM) Tampa, Florida — File No. BPH-830714AT

For a Construction Permit for a major change

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1990; Released: April 19, 1990

By the Commission:

1. This case concerns the proposal of Edens Broadcasting, Inc., the licensee of WRBQ-FM, a Class C station serving Tampa, Florida, to change that station's antenna site and install a higher antenna at the new site. Edens seeks a waiver of 47 C.F.R. § 73.207, which lists minimum distances for separation between the antenna sites of FM stations. Table A of section 73.207(b)(1) requires Class C FM stations on channels 10.6 MHz apart to be separated by at least 30 miles, so as to prevent intermediate-frequency (IF) intermodulation interference.[1] The proposed site for WRBQ-FM is short-spaced by 3.74 miles with respect to the antenna of WEZY(FM), Lakeland, Florida, another Class C station operating on a frequency separated by 10.6 MHz from the frequency assigned to WRBQ-FM. The licenseholder of WEZY(FM) is the Chapman S. Root Revocable Trust. ("Root").

2. Edens filed its application in response to the Report and Order in Docket No. 80-90, 94 FCC 2d 152 (1983), *recon. granted in part*, 97 FCC 2d 279 (1984), in which the Commission decreed that Class C FM stations transmitting from less than 984 feet above average terrain would be re-rated as Class C1 stations if their licensees did not apply prior to March 1, 1987 for authority to raise their antennas to or above that height. If WRBQ-FM were to be downgraded to Class C1 it would thereafter be prohibited from increasing antenna height to more than 984 feet, which is only half as much as the maximum allowed for full Class C stations, and would be accorded less interference protection than it is now entitled to. Edens alleged that in order to avoid reclassification it must change sites, because FAA regulations preclude use of a 984-foot-or-higher antenna at the station's present site in downtown Tampa. Edens further alleged that, operating as proposed with a 1,423-foot antenna at a site known as the Riverview antenna farm, WRBQ-FM would not project its 20 mV/m contour over that of WEZY(FM) and therefore that no objectionable IF interference would occur despite the short-spacing.

3. The ALJ ruled against Edens, holding that it had failed to prove that its present site is unsuitable or that suitable fully-spaced or less short-spaced sites are unavailable. FCC 86D-36, released May 14, 1986. The Review Board concluded that the present antenna site for WRBQ-FM is, indeed, unsuitable, but upheld the denial of Edens' application for failure to prove the unavailability of suitable fully-spaced or less short-spaced sites. In this regard, the Board concurred with the ALJ's finding that a fully-spaced site was available in the vicinity of Tarpon Springs which Edens had not shown to be unsuitable. Further, the Board held that it would be unfair to waive the rules to let Edens change to a short-spaced site so that it could preserve WRBQ-FM's Class C rating, because Root would consequently be precluded from raising the antenna for WEZY(FM) at that station's existing site to the new Class C minimum and would therefore have to resite *its* antenna to preserve its station's Class C status. 2 FCC Rcd 689 (1987).

4. To complicate matters, Root wants to change sites too. The Board noted that Root had filed an application for permission to change WEZY(FM)'s antenna site, *Id.* at 696 ¶ 34, which is still pending before the Mass Media Bureau. Root's motive for changing sites is evidently the same as Edens'. Root's existing antenna is only 430 feet high, *Id.* at 695 ¶ 32, and Root alleges that FAA restrictions and the FCC's duopoly rule prevent it from raising the antenna high enough at the present site to preserve the station's Class C rating. "Petition for Issuance of Order to Show Cause" at 19. (So it seems that the Board was mistaken in asserting that granting Edens' application would prevent Root from raising the antenna at WEZY(FM)'s existing site to the minimum height for Class C stations; the site is unsuitable for that purpose anyway, by Root's account.) The antenna that Root's application specifies would exceed the minimum level for Class C stations. *Id.* at 4. The site that Root's application specifies, which is in the vicinity of Duette, Florida, is fully-spaced toward WRBQ-FM's existing facility, but not toward the Riverview site that Edens is proposing in the instant application. *I.D.* at ¶ 40. Indeed, the distance between the Riverview site and the Duette site (17.5 miles) is considerably less than that between Riverview and WEZY(FM)'s existing antenna site. It thus appears that granting the instant application would preclude a grant of Root's application for permission to build an upgraded facility at Duette.[2]

5. The Board declared in dictum at the end of its opinion that it would best serve the public interest for the licensees of *both* stations, WEZY(FM) as well as WRBQ-FM, to upgrade their facilities as necessary to preserve their Class C status. Accordingly, the Board recommended against the Bureau granting the pending application by Root for permission to relocate WEZY(FM)'s antenna without taking into consideration the preclusive effect of such action on Edens' remaining options for relocating the antenna for WRBQ-FM, and it also urged the Bureau to waive the Docket 80-90 deadline for applying for authority for Class C upgrades. 2 FCC Rcd at 696 ¶ 35.

6. Edens contends in its application for review that the Board's decision to deny is arbitrary and capricious because Edens had produced a showing of good cause for waiving the spacing requirement that was equivalent to showings that had been deemed sufficient in analogous prior rulings. Edens refers to documentary evidence that the Bureau had granted numerous applications specifying

antenna sites that would be short-spaced with respect to IF separation, regardless of the availability of suitable fully-spaced sites, where it appeared that there would be no overlap of 20 mV/m contours. The reasons that the Board gave for rejecting that evidence as irrelevant are incorrect according to Edens, which therefore urges us to reverse the decision below and grant its application.

7. In an Order issued after Edens had filed its application for review, the Commission's General Counsel took notice of the following circumstances: that the Commission had recently proposed in *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas* (NPRM in Docket No. 87-121), 3 FCC Rcd 1820 (1988),[3] to change the rules so as to allow commercial FM licensees to use directional antennas short-spaced as to co-channel and adjacent-channel stations on a showing of contour protection; that the Commission had proposed in *Review of Technical Parameters for FM Allocation Rules of Part 73, Subpart B, FM Broadcast Stations*, 3 FCC Rcd 1661 ¶ 6 (1988), to adopt revised IF spacing requirements calculated to prevent overlap of predicted 36 mV/m contours of IF-related signals; that the predicted 20 mV/m contour of Edens' proposed facility would not overlap that of Root's existing facility and hence that there would apparently be no overlap of their predicted 36 mV/m contours; but that there was no evidence in the record as to whether the 36 mV/m contour of Edens' proposed facility would overlap that of WEZY(FM) if Root were to raise the latter's antenna at its present site to the Class C minimum or operate with the upgraded facility that it has proposed to construct near Duette. In light of those circumstances and in light of the Review Board's observation that it would serve the public interest for both stations to upgrade their facilities to the extent necessary to maintain their Class C rating, the General Counsel asked the parties to provide information as to the 20 mV/m contours of Edens' current proposal and of a full Class C facility at WEZY(FM)'s current site; the magnitude of the strongest overlapping contours of Edens' current proposal and of full Class C facilities at WEZY(FM)'s current and proposed sites; the area where Root could locate its antenna for full Class C operation in compliance with FCC and FAA requirements, assuming a grant of Edens' instant application; and any pertinent proposals for operation with directional antennas.

DISCUSSION

8. At the time the General Counsel directed the parties to submit further information on predicted contours, the Commission's policy regarding FM interference protection was in flux. It was not then clear, in light of the pending proposal to amend the rules to allow short-spacing of directional FM antennas toward co- and adjacent-channel facilities on a showing of contour protection, whether the Commission would adhere to strict mileage separation requirements for protection against IF interference or would instead relax the standard for IF-channel separation in the same way as it was proposing to relax the rules concerning co- and adjacent-channel separation. Had the Commission proceeded to alter the rule for IF separation to permit the placement of directional antennas at less than the prescribed distances from facilities transmitting on IF-related channels on a showing that predicted contours of given strength would not overlap, it might have been necessary to consider whether that change of policy logically compelled the adoption of a kindred approach considering contour protection in ruling on requests for waiver of the IF separation rule by applicants proposing to use *non* directional antennas, as Edens proposes here. But that eventuality has not come to pass. On the contrary, the Commission expressly declined to consider a contour-protection standard for IF-channel separation in its final reports in the Rule Makings in Docket Nos. 87-121 and 86-144, 4 FCC Rcd 1681, 1694 n.1 (1989), 4 FCC Rcd 3557, 3560 ¶ 24 (1989), and there is no proposal for such a change in policy currently under consideration.

9. The Commission recently stated that applicants seeking a waiver of the IF spacing requirements "must continue to show that fully-spaced or less short-spaced sites are not available and that grant of the waiver is in the public interest." *Report and Order* in Docket 87-121, 4 FCC Rcd at 1694 n.1; *Walter P. Faber, Jr.*, 4 FCC Rcd 5492 (1989). Edens has not made such a threshold showing.

10. In considering requests for waiver of co-channel and adjacent channel spacing requirements, the Commission has on rare occasion relaxed its threshold requirement upon a showing of "an unusual combination of public interest factors." *Caloosa Television Corp.*, 3 FCC Rcd 3656, 3657 (1988), *recon. denied*, 4 FCC Rcd 4762 (1989). *See also Fort Myers Broadcasting Co.*, 77 FCC 2d 863 (1980). A crucial distinction here, however, is that IF interference has more serious consequences than co-channel and adjacent-channel interference. For example, IF interference can prevent reception of all FM stations in the area rather than just the IF-related stations. *See Faber*, 4 FCC Rcd at 5494 n.7; *Report and Order* in Docket 86-144, 4 FCC Rcd 3562 n.1. This warrants stricter scrutiny of requests for waiver of IF spacing requirements than of requests for waiver of the co- and adjacent channel spacing requirements. In any event, the unusual public interest factors present in *Caloosa* and *Fort Myers* are not present here.

11. In *Caloosa*, the Commission noted that tower height restrictions at the present site put the licensee at a significant technical and competitive disadvantage, as other network affiliates operated from taller and more centrally located towers; that Caloosa's proposed site was the least short-spaced of the three areas at which the city had encouraged the development of tall towers and which the FAA had approved; that the proposal would provide the first off-the-air ABC television network service to 34,000 persons; and that the only station to which objectionable interference would theoretically be caused withdrew its objection once Caloosa agreed to use precision frequency equipment to preclude predicted objectionable interference. In *Fort Myers*, the Commission explained that the provision of a first aural service to approximately 8,000 persons without the need to construct a new tower outweighed the negative aspect of the three-mile short-spacing, inasmuch as it would not have been possible for the stations to provide first aural service to anyone from a fully-spaced site. In contrast, Edens has not shown here that there is an unusual combination of public interest factors to justify allowing it to use the proposed short-spaced site as opposed to one of the available less short-spaced sites, such as the fully-spaced site at Tarpon Springs.[4]

12. The main consideration that Edens advances as justification for waiver is that there would be no overlap between the 20 mV/m contours of WRBQ and WEZY. In this regard, it contends that the Bureau has granted numerous waivers of the IF spacing requirements in the absence of a threshold showing wh[illegible] the applicant has demonstrated that the predicted 20 mV/m contours of the IF-related stations would not overlap. The Commission recently considered and rejected the same argument in *Faber*, however. It held that any such staff rulings were inconsistent with Commission precedent and therefore not controlling, and that a waiver was not justified. *Faber*, 4 FCC Rcd at 5493.

13. In sum, Edens has not shown that it is entitled to a waiver of the IF spacing requirements. In this respect, nothing that it contends or alleges in its supplemental pleadings concerning possible alternative sites for Root's WEZY-FM warrants any different conclusion.[5]

14. ACCORDINGLY, IT IS ORDERED that the application for review that Edens Broadcasting, Inc. filed on March 6, 1987 IS DENIED.

15. IT IS FURTHER ORDERED: (a) that the contingent application for review that Chapman S. Root Revocable Trust filed on March 6, 1987 IS DENIED; (b) that the Request for Certification and Consolidation filed by Walter P. Faber, Jr. on April 23, 1987 and the motions to strike that Root and the Mass Media Bureau filed on May 14 and 19, 1987 ARE DISMISSED as moot; (c) that the Petition for Issuance of Order to Show Cause and for Related Relief that Root filed on July 29, 1988 IS DISMISSED; (d) that the Motion for Continuance that Root filed on July 29, 1988, the Motion for Leave to File Reply that Root filed on September 20, 1988, and the Motion for Leave to File Supplement to the Record that Edens filed on July 11, 1989 ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Because most consumer FM broadcast receivers use an intermediate frequency of 10.7 mHz for amplification and bandwidth processing, overlapping FM signals separated by 10.6 or 10.8 mHz can cause listeners to receive distorted signals from one of the stations involved no matter how they set their receivers' tuner dial. Thus, IF interference can prevent listeners from receiving clear signals from *any* FM station.

[2] The Chief of the Mass Media Bureau's FM Branch notified Root in a letter dated March 19, 1986 that its application, BPH 860421IC, would be dismissed because it proposed a site that was short-spaced toward Edens' proposed Riverview site and because it had been filed after the cutoff date for filing applications in conflict with Edens' application. Root filed a petition for reconsideration of the dismissal ruling, contending that it was wrong to dismiss its application due to conflict with Edens' because the latter had allegedly not been properly accepted for filing. The petition for reconsideration is still pending before the Bureau.

[3] That proposal has since been adopted. Report and Order, 4 FCC Rcd 1681 (1989).

[4] Edens contended below that the Tarpon Springs site was undesirable because WRBQ-FM would cast 57 percent of its primary coverage over the Gulf of Mexico, transmitting from there with a 2,000-foot, omnidirectional antenna. *I.D.* at ¶ 32. What matters, though, is the extent of predicted primary coverage on terra firma, in terms of areas and populations, from a full Class C facility at that site as compared with coverage from the site that Edens specifies in its application. By Edens' own estimate, less than one percent of the population within WRBQ-FM's present primary coverage would be excluded from its primary coverage area if Edens were to shift its antenna to a tall tower at Tarpon Springs. *Id.* at ¶ 34. Edens provided no information on the number of people who would be able to *receive* primary service from its station for the first time if it were to move to Tarpon Springs. *Id.* Nor did it provide sufficient information to permit a comparison to be made between a Tarpon Springs facility and the one that it proposes to construct in Riverview in terms of coverage of underserved areas. *Id.* at ¶ 39.

[5] Root proposes a channel-switching alternative in its supplemental pleadings, but we need not determine now whether that is the most satisfactory possible arrangement, as our action here does not foreclose it and the parties are free to pursue it outside this adjudicatory proceeding if either of them wishes to do so.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-563

In the Matter of

Amendment of Section 73.202(b),	RM-6078
Table of Allotments,	RM-6710
FM Broadcast Stations.	
(Dyersburg, Tennessee; De Witt,	
Heber Springs, Hoxie, Jonesboro,	
and Newport, Arkansas)	

FIRST REPORT AND ORDER

Adopted: March 22, 1990; Released: April 19, 1990

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Further Notice of Proposed Rule Making and Orders to Show Cause*, 4 FCC Rcd 4814 (1989), which optionally proposed to upgrade existing stations at Dyersburg, Tennessee (Channel 261C2 for Channel 261A), Newport, Arkansas (Channel 244C2 for Channel 288A) and Heber Springs, Arkansas (Channel 264C2 for Channel 244A), at the request of Dr Pepper Pepsi-Cola Bottling Company of Dyersburg, Inc. ("Dr Pepper"), licensee of Station WASL(FM) at Dyersburg, and Newport Broadcasting Co. ("Newport Broadcasting"), licensee of Stations KOKR(FM) at Newport and KAWW-FM at Heber Springs, both Arkansas. In addition, the *Further Notice* optionally proposed to allot Channel 264C2 at Heber Springs and/or Channel 244C2 at Newport, as a second local FM service, if competing expressions of interest were filed. *Orders to Show Cause* were issued to the licensees of stations at De Witt and Heber Springs, Arkansas, since several of the optional proposals, if adopted, would require changes at those communities. Dr Pepper filed comments and a further supplement reiterating its interest in obtaining an upgrade at Dyersburg. MSB Communications Corporation ("MSB"), licensee of Station KDEZ(FM), Channel 264A at Jonesboro, Arkansas, filed comments in support of the upgrade at Dyersburg. Newport Broadcasting filed comments. Dennis H. Mitchell ("Mitchell"), licensee of Station KHOX(FM), Channel 263A, Hoxie, Arkansas, Mountain Home Radio Station, Inc. ("Mountain Home"), licensee of Station KPFM(FM), Channel 288A at Mountain Home, Arkansas, and Pauline Rose ("Rose") filed comments. Newport Broadcasting, Mitchell and Dr Pepper filed reply comments.[1]

BACKGROUND

2. Initially the Commission issued the *Notice of Proposed Rule Making and Orders to Show Cause* in this proceeding, 2 FCC Rcd 7466 (1987), at the request of Dr Pepper proposing the substitution of Channel 261C2 for Channel 261A at Dyersburg, Tennessee, and the modification of its license for Station WASL(FM) to specify the higher class channel. In order to accomplish the station upgrade at Dyersburg channel changes were proposed at Jonesboro, Arkansas (Channel 262A for Channel 261A), Newport, Arkansas (Channel 264A for Channel 288A), and Hoxie, Arkansas (Channel 287A for Channel 263A). Since the channels at Jonesboro, Newport and Hoxie were occupied by Stations KDEZ(FM), KOKR(FM) and KHOX(FM), *Orders to Show Cause* were issued to MSB, Newport Broadcasting and Mitchell, respectively, directing them to demonstrate in comments why their facilities should not be modified to specify operation on the aforementioned new channels. MSB and Newport Broadcasting advanced counterproposals.[2]

3. Subsequently, the Commission issued the *Further Notice* in response to a counterproposal advanced in this proceeding by Newport Broadcasting seeking the substitution of Channel 244C2 for Channel 288A at Newport, the substitution of Channel 264C2 for Channel 244A at Heber Springs, and the modification of its licenses for Stations KOKR(FM) and KAWW-FM accordingly. The change at Heber Springs was necessary in order to accomplish the channel allotment at Newport. The Newport allotment also required the substitution of Channel 247A for Channel 244A at De Witt, Arkansas, currently occupied by Station KDEW-FM.[3]

4. Pursuant to Section 1.420(g) of the Commission's Rules, the *Further Notice* invited parties to file competing expressions of interest for the use of Channel 244C2 at Newport and Channel 264C2 at Heber Springs by the comment date established in the *Further Notice*, since the channels represented non-adjacent channel upgrades at Newport and Heber Springs. In addition, the *Further Notice*, requested additional comments from the parties concerning the reimbursement requirements.

5. The *Further Notice* set forth six optional plans designed to indicate possible outcomes depending on what comments were filed:

City	Channel No. Present	Proposed
	OPTION I	
De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	244A	264A
Hoxie, Arkansas	263A	287A
Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	288A	244C2
Dyersburg, Tennessee	261A	261C2
	OPTION II	
Heber Springs, Arkansas	244A	264C2
Hoxie, Arkansas	263A	287A

Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	288A	244A
Dyersburg, Tennessee	261A	261C2

OPTION III

De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	244A	264A
Newport, Arkansas	288A	244C2, 288A

OPTION IV

De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	244A	264C2
Newport, Arkansas	288A	244C2, 288A

OPTION V

Heber Springs, Arkansas	244A	244A, 264C2
Hoxie, Arkansas	263A	287A
Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	288A	244A
Dyersburg, Tennessee	261A	261C2

OPTION VI

De Witt, Arkansas	244A	247A
Heber Springs, Arkansas	244A	264C2
Hoxie, Arkansas	263A	287A
Jonesboro, Arkansas	261A, 270C, 300C	262A, 270C, 300C
Newport, Arkansas	288A	244C2
Dyersburg, Tennessee	261A	261C2

Option I contemplated the substitution of Channel 244C2 for Channel 288A at Newport, while Option II contemplated the substitution of Channel 264C2 for Channel 244A at Heber Springs and the substitution of Channel 261C2 for Channel 261A at Dyersburg. Options I and II contemplated situations in which either the Newport or the Heber Springs station would be upgraded, but not both. Options III, IV and V contemplated the filing of an expression of interest in one of the non-adjacent channel upgrades. Assuming an expression of interest in the allotment of Channel 244C2 at Newport, Option III would have provided Newport with its second local FM service, while precluding the Dyersburg upgrade and retaining Channel 288A at Newport. Option IV would have substituted Channel 264C2 for Channel 244A at Heber Springs, provide an expanded FM service at Heber Springs, and allotted Channel 244C2 at Newport as that community's second local FM service, if an expression of interest were made in the new allotment at Newport. Assuming an expression of interest were made in the new allotment at Heber Springs, Option V would have allotted Channel 264C2 at Heber Springs, provided that community's second local FM service and upgraded the facilities at Dyersburg. Option V would have required that existing stations at both Heber Springs and Newport retain Class A frequencies. Option VI contemplated that no competing expression of interests in either Channel 244C2 at Newport or Channel 264C2 at Heber Springs would be filed and would have permitted the upgrades of Station WASL(FM) at Dyersburg, Station KAWW(FM) at Heber Springs and Station KOKR(FM) at Newport.

COMMENTS

6. Mountain Home, in its comments, supports Optional Plans I, II, V or VI which would result in the removal of Channel 288A from Newport. Mountain Home suggests a counterproposal for the substitution of Channel 288C2 for Channel 288A at Mountain Home, Arkansas, and the modification of Station KPFM(FM)'s license to specify the higher class channel.

7. Rose, in her comments, opposes the allotment of Channel 244C2 at Newport, Arkansas. Rose also attempts to advance a counterproposal seeking the allotment of Channel 244C2 to McCroy, Arkansas, as that community's first local FM service.

8. In comments, Mitchell restates his objections to the proposed change to Station KHOX(FM) at Hoxie, in order to accomplish the Dyersburg upgrade. Mitchell argues that Dr Pepper and Newport Broadcasting should establish an escrow account to compensate him for all the expense that would be incurred in changing channels. Subsequently, Mitchell filed a request for withdrawal of his opposition. Mitchell states that an agreement has been reached with Dr Pepper concerning his reimbursement for the proposed changes to Station KHOX(FM). We shall permit the withdrawal of Mitchell's opposition to the proposed changes in the Hoxie frequency.

9. Newport Broadcasting, in its comments, contends that all of the optional proposals set forth in the *Further Notice* should be rejected because they would, without its consent, place its existing authorizations for Newport and Heber Springs at risk. Newport Broadcasting continues to argue that its counterproposal, advanced in this proceeding and the subject of the *Further Notice*, should be protected from competing applications. Newport Broadcasting further argues that it "would likely be forced to participate in a costly and protracted comparative hearing in order to secure the higher class allotment, with absolutely no assurance that it would ultimately prevail" because its counterproposal was not protected from competing expressions of interest. Instead, it presents a slightly

modified allotment scheme involving the substitution of Channel 244A for Channel 288A at Newport and Channel 264A for Channel 244A at Heber Springs, intended to enable the Dr Pepper upgrade, while protecting Newport Broadcasting's existing authorizations. Newport Broadcasting acknowledges that it has reached an agreement with Dr Pepper concerning the reimbursement requirements for the proposed change at Newport.

10. In comments, Dr Pepper states that it commits to fairly and reasonably reimbursing any station which is required to effect a frequency change solely to accommodate the proposed expanded service at Dyersburg. In support of its proposal, Dr Pepper provides substantial documentation to attest to its financial ability to effect the reimbursement. Dr Pepper further states that it has reached an agreement with the parties expected to change their facilities in order to accommodate the upgrade at Dyersburg.

11. In reply comments, Newport Broadcasting states that the counterproposals filed by Mountain Home and Rose should be rejected. Dr Pepper, in its reply comments, also states that the Rose counterproposal should be rejected.

DISCUSSION

12. We reject the counterproposals advanced by Mountain Home and Rose as procedurally defective. The counterproposals were filed in violation of Section 1.420(d) of the Commission's Rules, which specifically requires counterproposals to be filed by the initial comment date in a rule making proceeding. Furthermore, in the *Further Notice* we stated that we would not accept counterproposals to either the proposals set forth in the *Notice* or the proposals identified in the *Further Notice*, which had been advanced as counterproposals to the *Notice*.[4] The statement in the *Further Notice* was consistent with our normal cut-off procedures for the filing of counterproposals, and is a necessary restriction to achieve efficient processing and finality in allotment proceedings.

13. Because no party filed a timely expression of interest in the nonadjacent channels for Heber Springs and Newport, we need not consider Options II, IV, or V further. Under normal circumstances, this would have permitted us to adopt Option VI, and modify the licenses of the stations at Heber Springs, Dyersburg, and Newport pursuant to Section 1.420(g)(1) of the Commission's Rules. This action would have precluded the filing of any mutually exclusive applications. In its comments, however, Newport Broadcasting appears to have abandoned its interest in pursuing upgrades at Newport and Heber Springs, apparently on the mistaken assumption that an opportunity for competing applications would be provided even though no timely expressions of interest were filed.

14. Pursuant to Section 1.1204(b)(7) of the Commission's rules, the Commission requested clarification of Newport Broadcasting's views. Specifically, Newport Broadcasting was requested to address the question of whether, in the event higher class allotments were made to Newport and Heber Springs without providing an opportunity for the filing of competing applications for those allotments, it would pursue the upgrades. Although appearing to respond in the affirmative, Newport Broadcasting indicated it would not reimburse the licensee of a station at DeWitt for a necessary channel change.

15. Based on the information before us, we conclude that the public interest would be served by granting the upgrade of Station WASL(FM) at Dyersburg, Tennessee, from Channel 261A to Channel 261C2, and the concomitant substitutions of Channel 287A for Channel 263A at Hoxie, Arkansas, Channel 262A for Channel 261A at Jonesboro, Arkansas, and Channel 264A for Channel 288A at Newport, Arkansas. Channel 261C2 can be allotted to Dyersburg, as that community's first wide coverage area service, in compliance with the Commission's minimum spacing requirements with a site restriction of 6 kilometers (3.7 miles) west of Dyersburg.[5] The current transmitter sites for Station KDEZ(FM) at Jonesboro, Station KHOX(FM) at Hoxie and Station KOKR(FM) at Newport can be used to accomplish the channel substitutions.[6] We are herein modifying the license of Station WASL(FM) at Dyersburg, Tennessee, to specify operation on Channel 261C2 in lieu of Channel 261A in accordance with Section 1.420(g) of the Commission's Rules.

16. At this time, we decline to adopt the modified counterproposal set forth by Newport Broadcasting to substitute Channel 244A for Channel 288A at Newport and Channel 264A for Channel 244A at Heber Springs because it appears to offer no public interest benefit. The change at Heber Springs is not required in order to accomplish the Dyersburg upgrade. That change was only necessitated by the proposed allotment of Channel 244C2 at Newport, which Newport Broadcasting appears unwilling to pursue at this time. However, in view of the fact that its intentions are still unclear we shall hold in abeyance the Newport Broadcasting proposal to allot Channel 244C2 at Newport and Channel 264C2 at Heber Springs until resolution of the De Witt, Arkansas, proceeding. *See* fn. 3 *supra*. At the conclusion of the De Witt proceeding we shall issue a *Second Report and Order* addressing the Newport and Heber Springs proposals.

17. In accordance with the Commission's policy Dr Pepper is required to reimburse MSB, Newport Broadcasting and Mitchell as governed by the established guidelines set forth in *Circleville, Ohio*, 8 FCC 2d 159 (1967). The parties indicate that the extent of reimbursement has been agreed upon.

18. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 4, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Hoxie, Arkansas	287A
Jonesboro, Arkansas	262A, 270C, 300C
Newport, Arkansas	264A
Dyersburg, Tennessee	261C2

19. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Dr Pepper Pepsi-Cola Bottling Company of Dyersburg, Inc., for Station WASL(FM), Channel 261A, IS MODIFIED, to specify operation on Channel 261C2 in lieu of Channel 261A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

20. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of MSB Communications Corporation, for Station KDEZ(FM), Jonesboro, Arkansas, IS MODIFIED, to specify operation on Channel 262A in lieu of Channel 261A subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-870109KC except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-870109KC except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

21. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Newport Broadcasting Co., for Station KOKR(FM), Newport, Arkansas, IS MODIFIED, to specify operation on Channel 264A in lieu of Channel 288A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-6332 except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-6332 except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

22. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Dennis Harold Mitchell for Station KHOX(FM), Hoxie, Arkansas, IS MODIFIED, to specify operation on Channel 287A in lieu of Channel 263A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in License BLH-880308KC except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-880308KC except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

23. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to: MSB Communications Corporation, 1912 Woodsprings Road, Jonesboro, AR 72401; Dennis Harold Mitchell, Station KHOX, P. O. Box 37, Hoxie, AR 72433; and Newport Broadcasting Co., P.O. Box 989, Blytheville, AR 72316.

24. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530. Questions pertaining to the application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] On August 11, 1989, seven days before the filing date, Dr Pepper filed a motion for extension of time within which to submit reply comments herein. Subsequently, Mitchell and Dr Pepper filed late reply comments. Commission policy is not to routinely grant such requests for extension of time. In accordance with Commission policy the motion for extension of time will be denied. However, since the request for extension of time was timely filed and the parties are afforded two business days after denial of a timely extension request to submit pleadings, we shall consider the late-filed reply comments. *See* 47 CFR § 1.46(b).

[2] Mitchell failed to timely respond to the *Order to Show Cause* by the established date set forth in the *Notice*. Therefore, Mitchell was deemed to have consented to the initial proposal.

[3] Although Newport Broadcasting initially suggested the substitution of either Channel 247A or 247C2 for Channel 244A at De Witt, we have not entertained the C2 proposal herein. Newport Broadcasting failed to provide an expression of interest from Quadras, Inc., the licensee of Station KDEW-FM at De Witt, with its proposal. Subsequently, approximately 19 months after the cut-off date established in the *Notice*, Quadras, Inc.,

filed a separate petition for rule making requesting the upgrade of its station from Channel 244A to Channel 247C2. *See* RM-7056. That proposal will be separately considered.

[4] Mountain Home and Rose may initiate new proceedings to allot an available channel at Mountain Home, Arkansas, and McCroy, Arkansas, respectively, by filing petitions for rule making in accordance with Section 1.401 of the Commission's Rules.

[5] The restricted site coordinates are 36-02-40 and 89-26-46.

[6] The coordinates are 35-51-17 and 90-43-40 (Jonesboro); 36-02-24 and 90-59-11 (Hoxie); and 35-36-38 and 91-15-02 (Newport).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-197

In the Matter of

Amendment of Section 73.202(b), RM-7132
Table of Allotments,
FM Broadcast Stations.
(Arcola, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 21, 1990; Released: April 19, 1990

By the Chief, Allocations Branch:

1. At the request of Walnut Point Broadcasters ("petitioner"), the Commission considers herein a petition for rule making proposing the allotment of Channel 300A to Arcola, Illinois, as that community's first local broadcast service. Petitioner stated its intention to apply for the channel, if allotted.

2. An engineering analysis has determined that Channel 300A can be allotted to Arcola with no site restriction.[1] We believe the public interest would be served by proposing the allotment of Channel 300A to Arcola, Illinois, since that community could receive its first local FM channel.

3. The Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Arcola, Illinois	--	300A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 11, 1990,** and reply comments on or before **June 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Allan G. Moskowitz
Kaye, Scholer, Fierman, Hays, & Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitude 39-41-00 and West Longitude 88-18-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-198

In the Matter of

Amendment of Section 73.202(b), RM-7135
Table of Allotments,
FM Broadcast Stations.
(LeRoy, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 21, 1990; Released: April 19, 1990

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed McLean County Broadcasters, Inc. ("petitioner"), licensee of Station WMLA(FM), Channel 281B1, LeRoy, Illinois, requesting the substitution of Channel 281B for Channel 281B1 at LeRoy, Illinois, and modification of its license for Station WMLA(FM) to specify operation on the higher powered channel.[1]

2. An engineering analysis has determined that Channel 281B can be allotted to LeRoy in compliance with the Commission's minimum distance separation requirements with a site restriction 29.0 kilometers (18 miles) northeast,[2] in order to avoid a short-spacing to a construction permit for Station WCBH, Channel 282B1 at Casey, Illinois, and the licensed site of Station WJMK(FM), Channel 282B at Chicago, Illinois.

3. As requested, we shall propose to modify the license of Station WMLA(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 281B at LeRoy, nor require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. In view of the fact that LeRoy could receive an expanded wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
LeRoy, Illinois	281B1	281B

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 11, 1990,** and reply comments on or before **June 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

M. Scott Johnson
Catherine M. Grofer
Gardner, Carton & Douglas
1001 Pennsylvania Avenue, N.W.
Suite 750
Washington, D.C. 20004
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] WMLA(FM) currently operates on Channel 224A at LeRoy, Illinois. However, its license was modified by *Report and Order* in MM Docket No. 86-252, 4 FCC Rcd 7069 (1989) to specify operation on Channel 281B1.

[2] The coordinates are North Latitude 40-30-10 and West Longitude 88-28-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-199

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Beattyville, Kentucky) RM-7098

NOTICE OF PROPOSED RULE MAKING

Adopted: March 21, 1990; Released: April 19, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hour of Harvest, Inc. ("petitioner"), licensee of Station WLJC(FM), Channel 272A, Beattyville, Kentucky. Petitioner requests the substitution of Channel 271A for Channel 272A at Beattyville, and modification of the license for Station WLJC(FM) to specify operation on Channel 271A.

2. In support of its proposal, petitioner states that Station WLJC is short-spaced at its current site to Station WCYN(FM), Channel 272A, Cynthiana, Kentucky, and Station WUGO(FM), Channel 272A, Grayson, Kentucky. The substitution of Channel 271A for Channel 272A at Beattyville, argues petitioner, will eliminate these short-spacings.

3. Channel 271A can be allotted to Beattyville in compliance with the Commission's minimum distance separation requirement at Station WLJC's current licensed site, with a site restriction 3.9 kilometers (2.4 miles) northwest.[1]

4. We believe the public interest would be served by proposing the substitution of Channel 271A for Channel 272A at Beattyville. Accordingly, we will seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Beattyville, Kentucky	272A	271A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 11, 1990,** and reply comments on or before **June 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Harry C. Martin
Reddy, Begley & Martin
2033 M Street, N.W., Suite 500
Washington, D.C. 20036
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 271A at Beattyville are North Latitude 37-36-23 and West Longitude 83-41-16.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-200

In the Matter of

Amendment of Section 73.202(b), RM-7143
Table of Allotments,
FM Broadcast Stations.
(Newberry, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 20, 1990; Released: April 19, 1990

By the Chief, Allocations Branch:

1. At the request of Newberry Broadcasting Corporation ("petitioner"), permittee of Channel 263A, Newberry, Florida, the Commission considers herein a petition for rule making proposing the substitution of Channel 263C3 for Channel 263A at Newberry, and the modification of its construction permit (BPH-861217MF) to specify operation on the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. The allotment of Channel 263C3 can be made in compliance with the Commission's minimum distance separation requirements with a site restriction 13.4 kilometers (8.4 miles) west,[1] in order to avoid a short-spacing to Station WYGC, Channel 265A, Gainesville, Florida.

3. As requested, we shall propose to modify the construction permit at Newberry to specify operation on Channel 263C3 in lieu of Channel 263A in accordance with Section 1.420(g) of the Commission's Rules. Therefore, we shall not accept competing expressions of interest nor require the petitioner to demonstrate the availability of an additional equivalent channel at Newberry.

4. In view of the fact that Newberry could receive a wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Newberry, Florida	263A	263C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 11, 1990,** and reply comments on or before **June 26, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Dennis J. Kelly
Cordon and Kelly
1920 N Street, N.W., 2nd Flr.
Washington, D.C. 20036
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

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(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 263C3 are North Latitude 29-39-21 and West Longitude 82-44-49.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GRAPHNET, INC. File No. I-T-C-90-040

Application for authority to lease
and operate facilities for direct
Telex service between the U.S. and
Federal Republic of Germany.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 12, 1990; Released: April 18, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on December 14, 1989, as supplemented by letter of March 2, 1990 by Graphnet, Inc., requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct telex service between the U.S. and the Federal Republic of Germany (Germany). The application was placed on public notice on January 17, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct telex service to Germany by Graphnet.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-040 IS GRANTED, and Graphnet is authorized to:

a. lease from Comsat and operate one 9600 baud IBS channel between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean Region (AOR) connecting with a similar channel between the satellite and an earth station in Germany, furnished by Graphnet's correspondent in Germany;

b. lease from AT&T and operate one 9600 baud IBS channel in the Etam, West Virginia earth station;

c. lease and operate necessary connecting facilities between the Graphnet's operating office and the Etam, West Virginia earth station; and

d. use the above facilities to provide telex service between the U.S. and Germany.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Graphnet and its correspondent in Germany, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61 (October 1, 1989).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-90-050

Application for authority to acquire and operate facilities in the Private Transatlantic Telecommunications Cable System for the provision of authorized common carrier service to Bermuda, the Republic of Ireland and the United Kingdom and beyond.

ORDER AND AUTHORIZATION

Adopted: April 12, 1990; Released: April 19, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 9, 1990 by American Telephone and Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S., on the one hand, and Bermuda, the Republic of Ireland and the United Kingdom (U.K.), on the other hand, and points beyond. The application was placed on public notice on January 31, 1990. No comments were received.

2. AT&T is a common carrier engaged in the provision of interstate and foreign communications services. AT&T currently provides services to Bermuda, the Republic of Ireland and the U.K. via various satellites and cables now in existence, and proposes to supplement these facilities by use of the capacity in the PTAT-1 Cable System. AT&T has been authorized to acquire and operate a one-half interest in one E-1 and seven E-1 circuits[1] in the PTAT-1 cable for service between the U.S. and Bermuda and U.K. respectively.[2] It now proposes to acquire, on and Indefeasible Right of User (IRU) basis, a one-half interest in six E-1 circuits for service to Bermuda, six E-1 circuits for service to Ireland, and 44 E-1 circuits for service to the U.K. On an IRU basis, AT&T will pay not more than $350,000 for a one-half interest in one E-1 circuit to Bermuda and not more than $720,000 for a one-half interest in each E-1 circuit to the U.K. or Ireland.

3. The Commission stated in its *Private Submarine Cable Decision*[3] that it would require common carriers wishing to acquire capacity in PTAT-1 to file applications pursuant to Section 214 of the Communications Act.[4] Most recently, on August 22, 1989[5], we granted authority to six common carriers to acquire capacity in the PTAT-1 cable and to use this capacity to provide their authorized common carrier services between the United States and Bermuda, the Republic of Ireland, the U.K., and points beyond. We found that those applicants had provided all the information necessary for grant of the applications.[6] In addition, we found that the circumstances surrounding those applications did not raise an economic impact issue.[7] In the instant application, we find that AT&T's request fits into the same category as the above referenced applications granted on August 22, 1989. AT&T has filed all the information necessary under Section 63.01 of the Commission's Rules. Furthermore, AT&T states that it will be using the capacity in PTAT-1 to supplement existing facilities and the grant of this application will not adversely inpact other common carrier facilities for which AT&T has already been authorized.

4. Upon consideration of the application, we find that authorization of the requested services and facilities are required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-050 IS GRANTED, and AT&T is authorized to:

a. acquire, on an IRU basis, a one-half interest in six E-1 circuits in the PTAT-1 cable between the United States and Bermuda, six E-1 circuits between the U.S. and Ireland and 44 E-1 circuits between the U.S. and the U.K.;

b. acquire appropriate domestic connecting facilities; and

c. operate such capacity for the provision of AT&T's authorized services between the U.S. and Bermuda, Ireland and the U.K. and beyond.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to PSI herein under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] An E-1 circuit is equivalent to a capacity of 2.048 Megabits per second (Mbps).

[2] *See* AT&T, 4 FCC Rcd 7005 (1989).

[3] Private Submarine Cable Decision, 100 FCC 2d 1033 (1985).

[4] This requirement was restated in the *International Competitive Carrier* decision, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. Interna-

tional Competitive Carrier Policies, 102 FCC 2d 812, 845 (1985). Information requirements for Section 214 applications are found in Section 63.01 of the Commission's Rules 47 C.F.R. §63.01.

[5] *See*, CICI, Inc. *et al*, File Nos. I-T-C-89-103 *et al.*, 4 FCC Rcd 6622 (1989).

[6] The Commission places no special burdens on any carrier making an application for private cable capacity. It requires carriers to provide the information required by the Commission's rules to be contained in a Section 214 application. *See* Pacific Telecom, Inc., Request for Clarification of Policies Concerning Use of Independent Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989).

[7] The Commission stated that it has authority under its public interest mandate under Section 214 to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.* at 4456.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TWIXTEL TECHNOLOGIES, INC. File No. I-T-C-90-065

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: April 12, 1990; Released: April 18, 1990

By the Chief, International Facilities Division

1. The above-captioned application, filed on February 12, 1990 by TwixTel Technologies, Inc. (TwixTel), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on March 7, 1990. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by TwixTel.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-064, IS GRANTED, and TwixTel is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2, between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-337

In re Applications of

GEORGIA PUBLIC TELECOMMUNICATIONS COMMISSION	File No. BPED-870727MA
LOWELL MAZE JACKSON	File No. BPH-870727MD
IVAN M. MILES	File No. BPH-870727ME
JOHNSON BROADCASTING, INC.	File No. BPH-870727MF
PAUL UHRY MAZO d/b/a MAZO RADIO CO.	File No. BPH-870727MJ
ROBERT W. ROUNSAVILLE	File No. BPH-870727MK
SOUTHERN RADIO SERVICES, INC.	File No. BPH-870727ML
ROSWELL BROADCAST COMMUNICATIONS, LTD.	File No. BPH-870727MM
NEW GEORGIA BROADCASTING, LTD.	File No. BPH-870727MO
EATHEL HOLLEY	File No. BPH-870727MQ

For Construction Permit for a New FM Station on Channel 298A in Roswell, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1990; Released: April 20, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Two separate appeals by three different applicants challenging the presiding Administrative Law Judge's rulings to produce documents over objections based on a claim of privilege, 47 CFR 1.301(a)(2), have been consolidated for Review Board consideration. On February 14, 1990, Johnson Broadcasting, Inc. (JBI), appealed the ALJ's *Memorandum Opinion and Order*, FCC 90M-238, released February 8, 1990, requiring the production of a letter from the applicant JBI to its former counsel. On February 20, 1990, an appeal was filed by two other applicants, Robert W. Rounsaville and Ivan M. Miles, from an *Order*, FCC 90M-313, released February 20, 1990 requiring the production of certain classes of documents in the custody or control of the applicants. JBI opposed this appeal on March 2, 1990. Both appeals will be denied because the applicants failed to comply with the basic procedural requirements which must precede assertion of a privilege claim. *See Tri-State Community Development and Communications Corp.*, 4 FCC Rcd 2402 (Rev. Bd. 1989).

2. In ruling on JBI's privilege claim, the ALJ observed that:

> Under procedures set by the presiding judge at the outset of this case, where protection is sought against production of documents claimed privileged as attorney-client or work product, copies "must be submitted to the presiding judge with points and authorities for determination *in camera* of the availability of a privilege." *Prehearing Conference Order*, FCC 89M-2144, released August 23, 1989, at p. 6, citing procedures in *Metroplex Communications, Inc.*, 2 F.C.C. Rcd 4513 (Review Board 1987) (basis of privilege must be sufficiently precise to enable discovering party to evaluate merits of privilege claim). There has been no precise document by document (or even document category) analysis offered by JBI to support its claims of privilege. Thus, it cannot be determined on a document by document basis whether JBI relies on the attorney-client privilege or the attorney work product exception, each of which requires an independent analysis.

FCC 90M-238, at page 1.

3. On appeal, JBI has now narrowed its privilege claim to a single document contending that its pleading before the ALJ "included a document-by-document description of privileged communications between JBI and its former counsel, Thomas L. Root, including the aforesaid letter of July 10, 1989." Appeal at p. 4. Our own review of the record confirms the factual accuracy of the ALJ's ruling. JBI identified the relevant document as follows:

> "Letter from Johnson Broadcasting, Inc. to Root dated July 10, 1989 concerning amendments to the application."

But this letter was included among nine items, and all nine items were preceded by a bare claim that they were "privileged attorney-client communications and/or documents covered by the work product doctrine." JBI Ex. 6, pp. 4-5. No legal analysis accompanied the bare claim.

4. Rounsaville and Miles did not even identify their documents before the ALJ. On appeal, they contend that "by filing this appeal they do not concede that any of the requested documents exist. Rather, their purpose is to preserve the sanctity of the attorney-client privilege and the work product doctrine." Appeal at p. 2.

5. In sum, the record establishes that two of the applicants did not even identify the relevant documents, and *all* applicants failed to provide a legal analysis, or points and authorities, justifying the privilege claim as to each

document. Given the present factual situation, this case is controlled by the Board's *Tri-State Community*, *supra*, 4 FCC Rcd at 2402-2403. *Tri-State* denied a similar appeal because:

> It is elementary that a privilege claim "must list the document and *explain* why each document should not be produced," . . . otherwise, *judicial review of privilege claims would be a near impossibility*. As we stated in *LNJ Communications*, 3 FCC Rcd 2745 and 4411 (Rev. Bd. 1988), "documents for which a claim of [attorney work product or] attorney-client privilege are made should be *identified*, and the basis for the claim of privilege for each document should be *specified with particularity and [sufficient] precision.*" Producing the documents, together with specific objections for an in *camera* inspection by the ALJ, would have eliminated [appellant's] objections to disclosure. *See LNJ Communications*. 3 FCC Rcd 5046 (Rev. Bd. 1988). (Emphasis added.)

This reasoning fully covers the appeals before us which will therefore be denied. *See also WWOR*, 4 FCC Rcd 7509, note 1 (Rev. Bd. 1989), "privilege is a limited exception in the law's vigorous search for all relevant evidence, and one to be *strictly construed* and *carefully applied.*" (Emphasis added.)

6. ACCORDINGLY, IT IS ORDERED, That the Appeal of Johnson Broadcasting, Inc. filed February 14, 1990, and Appeal of Robert W. Rounsaville and Ivan M. Miles filed February 20, 1990, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-376

In the matter of

Amendment of the Commission's Rules to improve the quality of the AM Broadcast Service by reducing adjacent channel interference and by eliminating restrictions pertaining to the protected daytime contour.	RM-5532 RM-6174

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1990; Released: April 20, 1990

By the Commission:

INTRODUCTION

1. The Commission has before it a Petition for Reconsideration[1] ("Petition") requesting reconsideration of new rules pertaining to the authorized emission bandwidth permitted AM broadcasting stations. Those rules, recently adopted in the *First Report and Order*[2] ("*First Order*") in this proceeding, are based upon two standards developed by the National Radio Systems Committee ("NRSC"), a cooperative effort by the National Association of Broadcasters ("NAB") and the Electronics Industry Association ("EIA"). The standards, commonly known as NRSC-1 (an audio processing standard) and NRSC-2 (an emission standard), were specifically developed to combat interference between stations operating on nearby adjacent channels.[3] NAB and EIA, along with many broadcast licensees, have expended a substantial amount of time and resources developing standards to improve the quality of AM broadcasting.

2. The petitioners contend that: 1) there has not been an adequate study to establish the existence of second adjacent channel interference problems; 2) there has been no research to indicate how much, if any, second adjacent channel interference is acceptable to listeners; and 3) there is no reason to expect that the new rules will cause receiver manufacturers to build better quality receivers in the absence of FCC mandated receiver standards. Each of these contentions is addressed below.

BACKGROUND

3. This proceeding originated in 1986 when the Mass Media Bureau released its Report on the Status of the AM Broadcast Rules ("Report"), which noted a consistent decline in public satisfaction with the quality of AM broadcast service. This was attributed in part to deficiencies related to AM technical standards.[4] In pursuing the goal of improving technical conditions in the AM service, the Commission next issued a *Notice of Inquiry* ("*Inquiry*") soliciting comments to provide the basis for a comprehensive review of the technical assignment principles currently applicable to AM broadcasting.[5]

4. Because the *Report* and the *Inquiry* covered many diverse and complex issues, the Commission elected to address individual issues in separate "spin-off" proceedings. Accordingly, several separate associated rule making dockets were spawned from the *Inquiry* and each, including the instant proceeding, incorporated within its record applicable portions of the record previously established in the original *Inquiry*.

5. On November 6, 1987 (subsequent to issuance of the *Inquiry*), the Commission received from the NAB, a petition for rule making ("NAB Petition") requesting formal adoption of the "Voluntary National Standard, Audio Standard for AM Broadcast Stations" developed by the NRSC.[6] This audio standard was developed in the field under actual operating conditions and was reported to be successful in reducing the second adjacent channel interference that has plagued many market areas. The effectiveness of using less bandwidth can be attributed to a basic fact of physics, namely, that by attenuating emissions removed from the carrier frequency by more than 10 kHz, interference will be reduced when stations' operating frequencies are separated by 20 kHz. In this circumstance, second adjacent channel signal overlap will be effectively eliminated. Additionally, the amount of high frequency pre-emphasis within the authorized bandwidth also is limited by the NRSC standard, yielding some reduction of interference to first adjacent channel stations (*i.e.*, stations whose operating frequencies are separated by 10 kHz).

6. The popularity of the NRSC standards and success experienced by licensees who voluntarily complied with them prior to the adoption of the new rules, as well as the urgency expressed by broadcasters for relief from second adjacent channel interference, prompted the Commission to issue the *Notice of Proposed Rule Making* ("*Notice*") in this proceeding, which proposed to make compliance with the NRSC standards mandatory.[7] The problems of adjacent channel interference and the industry's enthusiasm for the NRSC standards as a means of alleviating it were discussed in the *Notice*.[8] In subsequently filed comments the broadcast industry overwhelmingly supported the proposed reduction in bandwidth. Accordingly, the *First Order* adopted the new emission standard essentially as proposed.

DISCUSSION

7. The petitioners first contend that there has not been adequate study to establish the existence of any significant second adjacent channel interference problems. They assert that although there might be some stations experiencing such interference, there is no indication that such interference occurs in any significant number of instances. They claim that any such interference problems should be treated on a case-by-case basis.

8. We have reviewed the record in this proceeding and find no reason to doubt that second adjacent channel interference problems have been significant and widespread. There was considerable opportunity for public comment on the matter of second adjacent channel interference and the need to reduce the RF emissions bandwidth to resolve the situation. A substantial number of parties did, in fact, use this opportunity to voice their

concerns that second adjacent channel interference was a widespread problem.[9] Thus, we have the benefit of extensive comments on this matter.

9. The record clearly indicates a consensus among representatives of the broadcast industry that reduction of second adjacent channel interference is urgently required to help curtail further degradation of the AM band. The accuracy of this conclusion is further demonstrated by the fact that about 20% of all licensed AM broadcast stations voluntarily, and without mandate by the Commission, modified their transmitters to comply with the NRSC standard, thus reducing interference to neighboring stations.[10] In a survey conducted by CRL, many other licensees declared their intent to follow suit at a future time.[11] We interpret this as broad support from the broadcast industry for Commission action that would effectively remedy interference problems.[12] Our adoption of the *First Order* requiring compliance with the NRSC standards was consistent with this need.

10. The Rule Making process requires that we establish a record of evidence and comment and base our decisions upon that record. In the matter at hand, we find that, although the record contains no specific quantitative data to indicate the exact number of second adjacent channel problems, numerous commenting parties confirmed the existence of widespread, significant second adjacent channel interference problems in the AM broadcast service.[13] For this reason we did not, at the time of the decision, believe that any further study of the subject was warranted.

11. Notwithstanding the compelling evidence in the record of the need for relief from second adjacent channel interference, the petitioners have failed to submit any new evidence to support their claim that the alleged second adjacent channel interference is inconsequential and does not warrant Commission action.

12. The petitioners next contend that there has been no research submitted to indicate how much, if any, interference is acceptable to listeners. Petitioners are incorrect. Within the record are two comprehensive reports of studies sponsored by the NAB on the subject. These two reports, AM Technical Assignment Criteria (Klein Report)[14] and AM Radio Interference Study (Angell Report),[15] were submitted in response to the *Inquiry* and entered into the record on June 17, 1988.

13. More importantly, however, in the context of the NRSC standards, a formal study to determine the exact level of "acceptable interference" is not necessary to justify imposition of the new rules. Because our current assignment criteria permit some overlap of channels, and because the NRSC standards tend to offer a balance between bandwidth available and interference encountered in the current environment of existing stations, it was never anticipated that "interference free" reception would be attained, only that some relief from interference would be realized.

14. The petitioners also contend that the new rules do not provide receiver manufacturers with an incentive to produce better quality AM broadcast receivers. They recommend mandatory AM receiver quality standards to force manufacturers to build higher quality receivers. The petition suggests that the All Channel Receiver Act, codified at 47 U.S.C. §303(s), of the Communications Act provides the precedent for such regulatory intervention. However, receiver standards are not within the scope of this proceeding.

CONCLUSION

15. We find that the petitioners have failed to produce any new evidence or to show any change in circumstances that would warrant reconsideration of the decisions reached in the *First Order*. The record clearly indicates an industry consensus that our action was required to reduce interference on adjacent channels. It also contains two reports addressing the petitioners' concerns regarding "acceptable levels" of interference. Lastly, the petitioners' request for mandatory receiver standards is beyond the scope of this proceeding. In sum, we believe that our adoption of the new emission standard will significantly reduce interference in the AM service. We also believe the new rules are sufficiently flexible, in that they provide two options for compliance (i.e., measurement or installation of a filter). For these reasons we find that the rules adopted in the *First Report and Order* serve the public interest. Therefore, we expect all AM stations to comply with them by the effective date of June 30, 1990.

ORDERING CLAUSE

16. Accordingly, IT IS ORDERED THAT the petition submitted jointly by Daytona, Magrill, and Gillen requesting reconsideration of the action taken in the *First Report and Order* in MM Docket No. 88-376 IS DENIED.

17. Further information on this matter may be obtained from Hank VanDeursen, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Petition, submitted jointly by the Daytona Group, Inc., Magrill Engineering, and Gillen Broadcasting, Inc. ("petitioners"), was received by the Commission on June 8, 1989.

[2] *See First Report and Order* in MM Docket No. 88-376, FCC No. 89-118, 4 FCC Rcd 3835 (1989).

[3] The NRSC-1 standard specifies technical characteristics of the audio signal at the input terminals of the transmitter and also limits the audio bandwidth to 10 kHz. The NRSC-2 standard limits the maximum radiated RF emissions to 20 kHz bandwidth (which is equivalent to the 10 kHz audio bandwidth from an AM station employing NRSC-1 audio processing). A discussion of both standards is contained in the *First Order*.

[4] *See* Report on the Status of the AM Broadcast Rules, April 3, 1986, p. 24.

[5] *See Notice of Inquiry* in MM Docket 87-267, adopted July 16, 1987, released August 17, 1987, FCC 87-245, 2 FCC Rcd 5014, 1987.

[6] *See* RM-6174, Public Notice No. 895, December 9, 1987.

[7] *See Notice of Proposed Rule Making* in MM Docket No. 88-376, adopted July 20, 1988, released September 12, 1988, FCC No. 88-252, 3 FCC Rcd 19-5687.

[8] *See id.* at ¶¶ 7-10.

[9] *See* comments received in response to the *Inquiry* from: Association for Broadcast Engineering Standards, Inc. ("ABES"); Association of Federal Communications Consulting Engineers ("AFCCE"); Bonneville International Corporation ("Bonneville"); Capital Cities/ABC, Inc. ("Cap Cities"); CBS, Inc.; Consumer Electronics Group-Electronic Industries Association; Continental Broadcasting Co.; Crawford Broadcasting Co.; Robert A. Jones; Karl D. Lahm; NAB; VIR James, P.C.; and Westinghouse Broadcasting Co. ("Group W"). *See* reply comments received in response to the *Inquiry* from ABES and Cap Cities. *See* comments received in response to the *Notice* from: Advisory Committee on Radio Broadcasting aka, Radio Advisory Committee; ABES; AFCCE; Bonneville; Cap Cities; Circuit Research Labs, Inc. ("CRL"); du Treil, Lundin & Rackley, Inc.; Delta Electronics, Inc. ("Delta"); GSM Media Corporation, WRGM; Greater Media, Inc.; KANE-AM; KYMN Radio, Inc.; Kneller Broadcasting of Charlotte County, Inc.; NAB; National Public Radio; Orban Associates, Inc. ("Orban"); Society of Broadcast Engineers, Inc.; Stephen R. Weber, Jr.; and Group W. *See* reply comments received in response to the *Notice* from: CBS; Delta; NAB; Orban and the US Department of Commerce ("NTIA").

[10] *See* NAB's Petition, *supra* at ¶ 5. Both comments filed in response to the *Notice* and broadcast trade publications indicated that during the time between the submission of the NAB Petition and the *First Order*'s release, additional stations voluntarily made modifications necessary to comply with the NRSC standards. Therefore, the actual percentage of stations in voluntary compliance on the day the *First Order* was adopted was nearly 20%. Such a voluntary action involving out-of-pocket expense to individual licensees vividly illustrates the broadcast industry's recognition of a need to reduce interference by limiting AM transmitter bandwidth.

[11] *See* Comments submitted by CRL in RM-6174, dated January 20, 1988 and received by the Commission on January 28, 1988.

[12] In response to the *Notice*, commenters were in total agreement regarding the reduction of authorized bandwidth. The issue in question was not whether, but rather how to implement the reduction.

[13] *See*, n.9, *supra*.

[14] Authored by Harrison J. Klein, P.E. of Hammett & Edison, Inc., June 17, 1988 on behalf of the AM Improvement Committee, National Association of Broadcasters.

[15] This report was prepared by B. Angell & Associates, Inc. for the National Association of Broadcasters in conjunction with MM Docket No. 88-267.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-524

In re Applications of

WILLIE A. JEFFERSON d/b/a OPPORTUNITY BROADCASTING OF SHREVEPORT	File No. BPH-870814MK
NTW, INC.	File No. BPH-870820ME
PORT CITY COMMUNICATIONS, L.P.	File No. BPH-870820MH
MARCOM	File No. BPH-870820MI
KYMHILKYLAA BROADCASTING COMPANY, INC.	File No. BPH-870820MO
INNOVATIVE WOMEN'S MEDIA ASSOCIATION	File No. BPH-870820MQ
CADDO BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870820MR

For Construction Permit for a New FM Station on Channel 275C2 in Shreveport, Louisiana

Appearances

Jeffrey D. Southmayd, and *Stephen C. Simpson*, on behalf of Opportunity Broadcasting of Shreveport; *Gene A. Bechtel*, on behalf of NTW, Inc.; *David Honig*, on behalf of Port City Communications L.P.; *Ellen S. Mandell*, on behalf of KYMHILKYLAA Broadcasting Company, Inc.; *Michael J. Hirrel*, and *Miriam C. Kircher*, on behalf of Innovative Women's Media Association; *James J. Freeman*, *Gregory W. Whiteaker*, *Mary V. Huff*, and *Joel E. Laiks*, on behalf of Caddo Broadcasting Limited Partnership; and *Larry Miller*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
EDWARD LUTON

Issued: April 11, 1990; Released: April 20, 1990

I. PRELIMINARY STATEMENT

1. This proceeding began with ten competing applicants seeking authority to construct a new FM broadcasting station at Shreveport, Louisiana. *Hearing Designation Order*, MM Docket No. 88-524, DA 88-1725 (released November 21, 1988) ("*HDO*"). Six applicants remain. They are Willie A. Jefferson, d/b/a Opportunity Broadcasting of Shreveport (hereafter Jefferson); NTW, Inc. (hereafter NTW); Port City Communications, L.P. (hereafter Port City); KYMHILKYLAA Broadcasting Company, Inc. (hereafter KYMHILKYLAA); Innovative Women's Media Association (hereafter Innovative); and Caddo Broadcasting Limited Partnership (hereafter Caddo).

2. The *HDO* set the following issues to be tried:

> 1) To determine whether there is a reasonable possibility that the tower height and location proposed by SLRP, NTW, Port City, Marcom, and/or Nor-Max would constitute a hazard to air navigation.
>
> 2) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> 3) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. The presiding judge resolved the first issue in favor of Port City. *See Order*, FCC 89M-880 (released March 20, 1989). Nor-Max and SLRP were dismissed pursuant to Orders of the presiding judge, FCC 89M-1386, released May 9, 1989, and FCC 89M-1885, released July 18, 1989. NTW entered evidence at the hearing with regard to the air hazard issues. (NTW Ex. 6). Marcom failed to file a notice of appearance in this proceeding and its application is hereby dismissed with prejudice.

4. A prehearing conference was held January 31, 1989. Hearing sessions were held June 6-9, 1989; June 12-13, 1989; and June 19, 1989. The record was closed on June 19, 1989 and the parties were directed to file proposed findings of fact and conclusions of law on August 30, 1989, and reply proposed findings by September 25, 1989.

II. FINDINGS OF FACT

Opportunity Broadcasting of Shreveport

5. Willie A. Jefferson is an individual doing business as Opportunity Broadcasting of Shreveport. (Jefferson Ex. 1). In the event Jefferson's application is granted, he will terminate any employment he may have at that time, relocate to Shreveport, Louisiana, and work full-time, a minimum of 40 hours per week, as the General Manager of the proposed FM station. (Jefferson Ex. 1). He will hold the highest management position at the station and will oversee all aspects of the station's operation. (Jefferson Ex. 1). He will have final decision-making author-

ity on all policy matters and other matters typically regarded as management responsibilities in the operation of a commercial FM station. (Jefferson Ex. 1).

6. Jefferson is a black male and a citizen of the United States. Jefferson has no ownership interest in any medium of mass communication (Jefferson Ex. 1). He is presently employed at WLTS-FM, WYAT(AM), Slidell, Louisiana, as an Account Executive and has been employed at WLTS-FM in that capacity since 1981. (Jefferson Ex. 1). In the event his application is granted, he will terminate his present employment at WLTS-FM, WYAT(AM) and/or any employment he may have at that time to relocate to Shreveport and assume his duties as General Manager of the proposed station (Jefferson Ex. 1).

7. The proposed station will utilize auxiliary generating equipment to allow for continued operation during power outages. (Jefferson Ex. 1).

NTW, Inc.

8. NTW, Inc., is incorporated under the laws of the State of Louisiana. (NTW Ex. 4). The shareholders of NTW, Inc. are as follows:

Dolores G. LaVigne	51 shares equaling 51% equity
Don L. Owen	29 shares equaling 29% equity
Pete Harris	20 shares equaling 20% equity

(*Id.*) All of the shareholders serve on the board of directors. (*Id.*) Ms. LaVigne is Chairman.

9. Neither NTW, Inc., nor any of its officers or directors holds any ownership interest in any medium of mass communications. (*Id.*)

10. NTW proposes to install auxiliary power generators at the studio and transmitter sites to insure that the station will be equipped to maintain its power service in the event of a loss of commercial power. (NTW Ex. 5).

11. The application was largely prepared by Mr. Owen, who gathered equipment estimates, prepared a budget, found the site, the engineer, the attorney, and the EEO contacts. (Tr. 184, 101-02, 186).

12. Dolores G. LaVigne proposes to work full-time, a minimum of 40 hours per week, as the General Manager of the proposed station. (NTW Ex. 1). In that capacity she will "establish overall station policy and direct the day-to-day operations and management of the station." (*Id.*)

13. She has committed to curtail her involvement with her other business activities, which are primarily passive investment interests, to which she devotes approximately six to eight hours per week. (*Id.*) She employs a business manager who is capable of overseeing her business interests without direct supervision. (NTW Ex. 1).

14. Don L. Owen proposes to work full-time, a minimum of 40 hours per week as NTW's proposed Station Manager. (NTW Ex. 2). He will be responsible for daily implementation of overall station policy; he will have authority over station department heads and staff; and he will be responsible for the EEO program of the station. (*Id.*) He also proposes to participate in program production by assisting Mr. Harris in developing programming and public affairs announcements, performing on-air work, and gathering news. (Tr. 202).

15. Since January 1, 1985, Mr. Owen has served as a Louisiana Public Service Commissioner from the Fifth District. Since 1988, he has been the Chairman of the Commission (Tr. 172). Although this is a part-time position, Mr. Owen presently devotes approximately 35 to 40 hours per week to the position. (Tr. 85, 86, 181). He does this because he has no other business duties and finds the work interesting. (Tr. 85). Mr. Owen believes that he can perform his Commission duties within a maximum time limit of ten hours per week, and this is what he proposes to do if NTW is granted the construction permit. (Tr. 86, 174). At least three of the other Commissioners hold full-time employment positions in addition to their positions on the Public Service Commission: one of them heads a large grocery chain, another of them heads an oil company, and the other is an attorney. (Tr. 178-79). Mr. Owen presently devotes one day per month plus four hours of preparation time for attendance at Commission meetings in Baton Rouge, Louisiana, and one day per month at a second Commission office in Monroe, Louisiana, and uses approximately ten hours per month traveling throughout his district. (Tr. 129-33, 180-82).

16. Pete Harris proposes to work full-time, a minimum of 40 hours per week, as NTW's proposed Director of Public Affairs and Community Relations. In this capacity, he will direct and implement the station's public affairs programming and serve as station liaison with the community. (NTW Ex. 3). Mr. Harris testified that he does not know the full scope of his involvement with the station (Tr. 318), but "was told by Mr. Owen what my responsibilities would probably be." (Tr. 330). Mr. Harris said Mr. Owen would have to train him. (*Id.*) Mr. Harris testified that he would act as a reporter and go out and gather information on what was happening in the community and bring it in to the newswriters to be put on the air. (Tr. 342-43).

17. In order to fulfill his intergration commitment, Mr. Harris will curtail his involvement as principal owner and manager of the Freeman and Harris Cafe by terminating his position as General Manager and withdrawing from the day-to-day management of the restaurant. (NTW Ex. 3).

18. Mr. Owen is 59 years old, and has been a resident of Shreveport for the past 35 years. (NTW Ex. 2). Ms. Lavigne is over 50 years old and has lived in Shreveport virtually her entire life. (NTW Ex. 1). Mr. Harris is 72 years old. Mr. Harris is a black male, and has resided in Shreveport for the past 52 years. (NTW Ex. 3). Ms. Lavigne is a female.

19. Ms. LaVigne was the principal owner (49%) and Chairman of the Board of KSLA-TV, Inc., the former licensee of station KSLA-TV, Shreveport, Louisiana, from 1978 to 1982 (NTW Ex. 1). As Chairman of the Board, she set station policy and represented the station at affiliate's meetings and other functions in communities throughout the service area. (*Id.*) Ms. Lavigne did not maintain an office at the station and was not present on a daily basis. (Tr. 191). All department heads reported to the General Manager rather than to Ms. Lavigne. (Tr. 192).

20. Mr. Owen has 36 years of broadcast management experience. (NTW Ex. 2). From 1954 until July 1984, he was Vice President and News Director of KSLA-TV. He supervised the news department, set news policy, directed the station's long-term planning, and anchored the nightly newscast. He was employed in various on-air positions at various other stations during the six years between 1948-1953. (*Id.*)

21. Ms. Lavigne is active in civic and community activities in Shreveport, including the following:

- Member, Shreveport Chamber of Commerce (1956 to present);
- Member, St. Mark Episcopal Church (1957 to present);
- Member, Junior League of Shreveport (1961 to present);
- Member, Shreveport Opera Guild;
- Member, Shreveport Summer Music Festival;
- Member, Friends of Louisiana Public Broadcasting;
- Member, Red River Arts Festival;
- Life Member, YMCA, Shreveport (1979 to present);
- Member of the Committee of 100 (a group of 100 local civic leaders who contribute funds and decide how the funds are to be invested for specific community projects selected by the committee) (1987 to present);
- Member, University Associates (LSUS) (group dedicated to the betterment and enrichment of the campus and student body of LSU-Shreveport through the provision of grants, scholarships, and other programs) (Louisiana State University in Shreveport, 1983 to present);
- Member, Louisiana Ducks Unlimited (organization dedicated to preservation of water fowl and their habitats) (approximately 1978 to present);
- Member, Advisory Board of Schumpert Medical Center (devoted an average of one hour per month to this activity since 1980-81 to present);
- Member, Pegasus Club (nonprofit organization which through collection of dues and donations provided funds for the betterment of the community, including providing funds to the diabetes association, kidney foundation, eye bank, cancer fund, heart fund, and the like) (approximately five hours per year devoted to this activity); and
- Member of the Board of Louisiana Nature Conservancy (nonprofit group whose resources are devoted to the protection of ecologically significant natural areas) (1988 to present).

22. Past civic and community activities in Shreveport have included:

- Member of the Board of Directors, Rutherford House, Inc. (project to rehabilitate troubled teenagers, *e.g.*, those with drug problems) (1972 to 1977);
- Member of the Board of Directors of LSU Associates (Louisiana State University-Shreveport) (devoted approximately three hours per month to this activity, (1983 to 1987);
- Vice President, Shreveport Chamber of Commerce Government and Transportation Committee (devoted approximately three hours per month to this activity, 1976 to 1978);
- Member, Greater Shreveport Downtown Development Foundation;
- Member, Greater Shreveport Economic Development Corporation (approximately 1980 to 1986) (approximately one hour per month devoted to this activity);
- Member, Metropolitan Planning Commission (devoted approximately four to six hours per month to this activity, 1974 to 1979);
- Member, Board of Directors, American Red Cross (devoted approximately two hours per month to this activity, 1987 to 1988);
- Underwriter for public radio station KDAQ (affiliated with Louisiana State University-Shreveport) (active in 1984 fundraising efforts, currently a financial contributor);
- Member (until 1984), and Member of the Board (1978-79), Louisiana Association of Business and Industry;
- Chairman, Juvenile Court Tax Renewal Committee (1976);
- Co-Chairman, Community Gifts for Allendale YMCA Building Fund (active in fundraising to construct a new building in Allendale, 1975); and
- Member, Red River Revel Board (nonprofit organization that conducts annual art festival on the Red River as an educational program for children) (1983-84). (NTW Ex. 1).

23. Don Owen is active in civic and community activities in Shreveport, including the following:

- Member, St. Mark Episcopal Church (since 1960);
- Member, Board of Directors, The Louisiana State Fair (nonprofit organization that oversees the annual ten-day state fair) (1986 to present);
- Chairman, "One Can Make A Difference," (food drive to stock area food banks) (approximately 20 hours devoted to this activity) (1988);
- Master of Ceremonies, fundraising benefit for Caddo/Pine Island Oil Field Museum (approximately 10 hours devoted to this activity) (1987);
- Emcee, Easter Seals/March of Dimes Telethon (approximately 24 hours devoted to this activity) (1986); and
- Emcee, March of Dimes Telethon (approximately 100 hours devoted to this activity) (1957-58). (NTW Ex. 2).

24. Pete Harris is active in civic and community activities in Shreveport, including the following:

- Member and President of Financial Committee, Blessed Sacrament Catholic Church (member, since 1980; president 1985 to present);
- Member and President, Shreveport Landmark (nonprofit organization engaged in upgrading rundown housing) (1983 to present);

- Member of Board of Directors, United Way, Shreveport, including service on the planning and allocation committee and the agency admission committee (director, 1979 to present; service on committees, 1979 to 1986);

- Member, Shreveport Rotary Club (1986 to present);

- Charter Member, American Legion Post 525 (1947 to present);

- Member, Shreveport Airport Authority (1985 to present);

- Member, Shreveport committee of 100 (a group of 100 local civic leaders who contribute funds and decide how the funds are to be invested for specific community projects selected by the committee) (1987 to present); and

- Loan Officer, Shreveport Carver Federal Credit Union (1965 to present).

25. The Federal Aviation Administration has determined that the antenna proposal of NTW will not constitute a hazard to air navigation. (NTW Ex. 6).

Port City Communications, L. P.

26. Port City Communications, L.P. is a limited partnership. The sole general partner and 25% equity owner is Larry English. The sole limited partner and 75% equity owner is A.H.A.B. Family Trust. (Port City Ex. 1).

27. Port City has no attributable media interests. (Port City Ex. 2).

28. The general partner of Port City Larry English, a black male, proposes to work full-time, a minimum of 40 hours per week, as General Manager of the station. (Port City Ex. 3). He will be responsible for all "management, administrative, budgetary, and programming decisions" of the station. (*Id.*) He has been employed part-time as Assistant to the Chancellor of Louisiana State University since September of 1988, and has committed to resign this position if Port City is awarded the construction permit. (*Id.*)

29. Mr. English has resided in Shreveport his entire life, except during his service in the U.S. Army (1973-76) (Port City Ex. 3).

30. Mr. English participated on the Advisory Board of Shreveport public radio station KDAQ-FM from May 1988 to the present. (Port City Ex. 3). His participation involves meetings of approximately two hours on a bimonthly basis, and on-the-air fundraising efforts. (Tr. 492). He has worked as the host and producer of a weekly community affairs program on the local access channel of Cablevision of Shreveport, a position he has held since June 1988. Mr. English has also participated in fundraising efforts for public radio station KDAQ-FM in Shreveport. Since May 1988, he has worked in four fundraisers consisting of on-air appeals during the morning radio show. (Tr. 492).

31. Mr. English seeks enhancement credit for the following claimed civic activities:

March 1989 - Present	Participant in Leadership Louisiana. Selected from across the state as one of 32 outstanding young leaders for this program sponsored by Citizens for a Better Louisiana.
January 1989 - Present	Member of the Advisory Board, Shreveport Children's Museum.
January 1989 - Present	Member of the Board, McDade House (hospital affiliated home for relatives of patients).
July 1988 - Present	Commissioner, Shreveport Housing Authority.
June 1988 - January 1989	Member of the Board, Black/White Communications Task Force (administering body for Gannett Foundation grant designed to enhance interracial communications in Shreveport).
May 1988 - Present	Member of the Board, Carver Branch YMCA.
May 1988 - Present	Member of the Advisory Board of KDAQ-FM, a public radio station in Shreveport. Actively involved in fundraising for the station.
February 1988 - Present	Member, Forum Shreveport Chamber of Commerce.
February - September 1988	Campaign Manager, June Phillips for Congress (Democratic primary candidate in 4th Congressional District which includes Shreveport).
September 1987 - May 1988	Leadership Shreveport/Bossier (Chamber of Commerce training program for outstanding young leaders).
January - December 1987	Member of the Board, Shreveport Chapter of Literacy Volunteers of America.
July 1986 - Present	Member, Shreveport Branch of the NAACP. President from December 1986 - December 1988.
April 1980 - Present	Member, Lane Chapel C.M.E. Church.

32. Port City will utilize auxiliary power to continue station operations in the event of power failures.

KYMHILKYLAA Broadcasting Company, Inc.

33. KYMHILKYLAA Broadcasting Company, Inc. ("KYMHILKYLAA") is a Louisiana corporation (KYMHILKYLAA EX. 1). Hilry Huckaby, III is the President, Chairman of the Board, and sole holder of 100% of the issued and authorized shares of KYMHILKYLAA stock. (*Id.*)

34. Mr. Hilry Huckaby, III, a black minority, will work full-time, a minimum of 40 hours per week, at least five days per week, eight hours per day or more, as General Manager of the proposed station. In that position, he will exercise authority over all station employees. Mr. Huckaby's other duties will include the institution and implementation of all policies and procedures governing operation of the proposed station. (KYMHILKYLAA Ex. 3).

35. Mr. Huckaby currently is a sole practitioner in the private practice of law in Shreveport. (KYMHILKYLAA Ex. 3). He has practiced law in Shreveport since 1972. (Tr. 547).

36. If KYMHILKYLAA's application is granted, Mr. Huckaby will substantially limit and restrict his law practice to an office practice in order to devote himself to the full-time management and operation of the proposed station. (KYMHILKYLAA Ex. 3). Mr. Huckaby will limit the amount of time he devotes to the practice of law to no more than ten hours a week. (KYMHILKYLAA Ex. 3; Tr. 593). He will reduce his case load either by accepting less work than at present or by bringing in an associate. (Tr. 593). If necessary, Mr. Huckaby will cease to practice law entirely in order to fulfill his full-time commitment to the station. (KYMHILKYLAA Ex. 3; Tr. 621).

37. Mr. Huckaby is a member of the Shreveport City Council. (KYMHILKYLAA Ex. 3). This part-time elected position requires eight hours per month for Council meetings and agenda review the afternoon prior to Council meetings. (KYMHILKYLAA Ex. 3). City Council meetings are held on the second and fourth Tuesday of each month at 3:00 p.m. and an administrative conference is held each preceeding Monday at 3:00 p.m.; the Council meetings and the administrative conference last approximately two hours each. (Tr. 549).

38. Mr. Huckaby's term on the City Council expires in September 1990. (Tr. 553). He has not decided whether to seek re-election. (Tr. 553). If KYMHILKYLAA's application is granted prior to the end of his term, he will serve out his term, and implement his integration proposal while serving as a City Councilman. (Tr. 553).

39. Mr. Huckaby is a native of Shreveport, Louisiana. (KYMHILKYLAA Ex. 3). He has lived in Shreveport his entire life, except during college and law school, and during his employment with the Equal Employment Opportunity Commission in Washington, D.C. (1966-67) and New Orleans, Louisiana (1969-72).

40. Mr. Huckaby has provided legal services to the NAACP Legal Defense and Education Fund from 1972 to the present; he received a small stipend for his NAACP efforts from 1972 through 1975. (KYMHILKYLAA Ex. 3; Tr. 541).

41. On September 16, 1978, Mr. Huckaby was elected to the Shreveport City Council. Mr. Huckaby was re-elected to the City Council for his second term in September 1982. Mr. Huckaby was re-elected to the City Council, to serve a third term in November 1986, and presently serves as Vice-Chairman of that body. (KYMHILKYLAA Ex. 3).

42. Mr. Huckaby is a member of the Galilee Baptist Church, Shreveport, Louisiana. (KYMHILKYLAA Ex. 3).

43. Mr. Huckaby formerly was Chairman of the Board and 25% owner of Benton Broadcasting Corporation d/b/a KDKS-FM, Benton, Louisiana. (KYMHILKYLAA Ex. 3; Tr. 563, 607). Mr. Huckaby spent some time at the station as a "somewhat General Manager." (Tr. 633-35).

44. Neither KYMHILKYLAA nor Mr. Huckaby has an ownership interest in, nor serves as an officer director of any medium of mass communication.

45. KYMHILKYLAA will install emergency power generating equipment at the transmitter and studio to ensure continuity of station operations in the event of power outages or shortages.

Innovative Women's Media Association

46. Innovative is a limited partnership organized under Louisiana law. (NTW Exs. 7, 8 and 12). It has five general partners and two limited partners. (Innovative Ex. 1). The general partners are Mavice Colley Wallette, Gwendolyn Campbell, Rosetta R. Reed, Burnadine Anderson, and Martha M. Boone. (Innovative Ex. 1). The limited partners are Kent S. Foster and Michele Krajicek. (NTW Ex. 12). The general partners as a group hold 50% of the equity in the partnership. (NTW Ex. 7). Each of the general partners individually holds 10% of the equity and 20% of the partnership vote. (*Id.*) Kent S. Foster holds 45% of the equity and Michele Krajicek holds 5%. (NTW Ex. 12).

47. The partnership is capitalized with $10,000. (Tr. 1367). Each of the general partners has contributed $1,000 in capital, in proportion to her 10% equity share. (*Id.*) At the time Innovative filed its application on August 20, 1987, Michele Krajicek was the sole limited partner. (NTW Ex. 7). She contributed $5,000 in capital, in proportion to her then 50% equity share. (Tr. 1367). By an agreement dated September 20, 1987, Krajicek purported to transfer 90% of her limited partnership interest to Mr. Kent S. Foster. (NTW Ex. 13; Tr. 778-80). Neither Mr. Foster nor Ms. Krajicek informed the general partners of this purported agreement. Innovative's partnership agreement specifically prohibits the sale or transfer of any general or limited partnership interest until two years after an FCC license is issued to the partnership. (NTW Ex. 7).

48. When Innovative's communications counsel learned in December 1988 of the purported agreement between Ms. Krajicek and Mr. Foster he told both of them that the agreement was invalid under the partnership agreement because Foster's admission to the partnership had to be approved by the general partners. (Innovative Ex. 8A, pp. 19, 14; Innovative Ex. 9A, p. 20). Accordingly, a new agreement was drawn up between Ms. Krajicek and Mr. Foster. (NTW Ex. 18; Innovative Ex. 8A, pp. 24-25). The new agreement expressly superseded the old one, and was made subject to approval by the general partners through amendment of the partnership agreement. (NTW Ex. 18, para. 8 and 5). The new agreement was signed in January 1989. (NTW Ex. 18).

49. In December 1988 Ms. Krajicek had already called Mrs. Boone requesting approval of Mr. Foster. (Tr. 940-41, 973-74). Mrs. Boone then called each of the general partners, and each of them agreed to the admission of Mr. Foster. (Tr. 940-42, 708-09; Innovative Ex. 11, p. 46; Innovative Ex. 12, pp. 42-43; Innovative Ex. 13, p. 43). Mrs. Boone requested Innovative's local counsel to draw up an amendment to the partnership agreement admitting

Mr. Foster as a 45% limited partner. (Tr. 943). The amendment was drawn and executed by all parties in late January and early February 1989. (NTW Ex. 12).

50. Mr. Foster has met the general partners only twice; the first time partnership matters were not discussed; the second time, both Mr. Foster and some of the general partners visited a bank in Shreveport regarding a bank letter. (Tr. 924-25, 926, 956, 1013, 687; Innovative Ex. 11, p. 39; Innovative Ex. 9A, pp. 5-6, 25-26). The first time Ms. Krajicek met any of the general partners was at her deposition in May 1989. (Innovative Ex. 8, p. 26-27; Tr. 1012, 814). The limited partners have had some telephone contacts with the general partners, and those have been in connection with meeting cash calls made by the general partners. (Tr. 1013, 820, 1364-65; Innovative Ex. 9A, pp. 26-27, 39-40; Innovative Ex. 8A, pp. 26-30).

51. None of Innovative's general partners holds any media ownership interest. (Innovative Exs. 3, 4, 5, 6 and 7). Gwendolyn Campbell is an employee of KTBS-TV, Shreveport, a position from which she will resign if Innovative is granted the construction permit. (Innovative Ex. 5). The general partners have no other media affiliations. (Innovative Exs. 3, 4, 5, 6 and 7).

52. Each of Innovative's general partners will be employed full-time, 40 hours per week or more, in the day-to-day management of Innovative's radio station. (Innovative Exs. 3, 4, 5, 6 and 7).

53. Gwendolyn Campbell will resign from her present position and become the General Manager of Innovative's station. As General Manager, Ms. Campbell will be responsible for all station operations. She will be responsible for determining major station policies and for developing and implementing those policies. She will hire and supervise the management level employees of the station. She will have overall supervisory responsibility for all station activities and will, in consultation with the other general partners, have decision-making authority with respect to all station activities. She will be responsible for all managerial functions that the General Manager of a radio station generally assumes. (Innovative Ex. 5).

54. Mavice Colley Wallette will give up her present retirement and serve as Program Manager of Innovative's station. In this position, Mrs. Wallette will be responsible for music and entertainment programming and production, including production of commercials, on a day-to-day basis. (Innovative Ex. 3). She will be responsible for the selection of programs to be aired, whether locally produced or otherwise. (*Id.*) She will be responsible for selecting music to be played, creating the station's weekly play list, and scheduling programs. (Tr. 664, 1327). Mrs. Wallette will supervise the station's efforts to determine listening preferences in the Shreveport community. (Innovative Ex. 3). She will supervise all personnel having primary production and programming responsibility, including a staff of five full-time announcers and one part-time announcer. (*Id.*)

55. Martha M. Boone will give up her retirement and become Innovative's Business Manager. (Innovative Ex. 4). As Business Manager, she will manage all business functions of the station. These functions will include finance, banking, accounting, traffic, logging, billing, collections, and inventory. Mrs. Boone will manage recruitment and training of personnel, payroll, and benefits. She will, together with the Chief Engineer, be responsible for all equipment purchases. She will set, in consultation with the General Manager and the general partners, station policy as to acquisition of debt, equipment purchases, banking policies, and personnel policies. She will supervise three employees: a secretary/receptionist, a bookkeeper and payroll specialist, and a traffic clerk. (Innovative Ex. 4; Tr. 915-21).

56. Rosetta R. Reed will retire from her present position and serve as the Sales Manager of Innovative's radio station. In that position, she will be responsible for the station's commercial sales and public service announcements. She will be responsible for the sale of air time to syndicators and advertisers. She will supervise all station commercial sales. She will also oversee the development and implementation of rate schedules for advertisers and other purchases of air time. She will manage the station's marketing program to advertisers. Dr. Reed will supervise three account executives. (Innovative Ex. 6).

57. Burnadine M. Anderson will resign from her present position and become News and Public Affairs Director of Innovative's radio station. She will be responsible for the production and presentation of the station's news and public affairs programs. She will run the station's community relations program and will be responsible for EEO compliance. Mrs. Anderson will supervise two news reporters and one anchor/public affairs host/reporter, each of whom will have news and public affairs responsibilities, and one community relations program specialist. The community relations program will seek information as to the needs of the community that may be addressed in the station's public affairs programs. (Innovative Ex. 7).

58. Gwendolyn Campbell, Mavice Wallette, Rosetta Reed and Burnadine Anderson are all residents of Shreveport, Louisiana. (Innovative Exs. 3, 5, 6 and 7). Ms. Campbell has been a resident of Shreveport since 1978, and previously resided there from 1954 to 1959, and from 1967 to 1968. (Innovative Ex. 5). Mrs. Wallette has been a resident of Shreveport all her life. (Innovative Ex. 3). Dr. Reed has been a resident of Shreveport all her life. (Innovative Ex. 6). Mrs. Anderson has been a resident of Shreveport all her life, except from 1968 to 1977. (Innovative Ex. 7).

59. Mrs. Boone is a resident of Keithville, Louisiana, and has been since 1968. (Innovative Ex. 4). Keithville is an immediately adjacent suburb of Shreveport (*Id.*), located entirely within the service area of Innovative's proposed station. (*Id.*) Mrs. Boone resided in Shreveport from 1958 to 1968. (*Id.*) Mrs. Boone was employed in Shreveport continuously from 1962 until her retirement in 1987.

60. Each of Innovative's general partners is a black female. (Innovative Exs. 3, 4, 5, 6 and 7).

61. Gwendolyn Campbell has been, since 1980, the education reporter for station KTBS-TV. In this position she is responsible for education stories, series and talk shows involving education matters in the five-parish Shreveport area. She also produces a weekly show, "People Who Care," covering people who help others, but who would not otherwise make the news. (Innovative Ex. 5).

62. Ms. Campbell served as Vice President of the Shreveport Association of Black Journalists from January 1986 to January 1987. Since 1980, she has been a member of the Shreveport Chapter of the Sigma Delta Chi Society of Professional Journalists. (Innovative Ex. 5).

63. Ms. Campbell served on the Board of Directors of the Carver Branch YMCA in Shreveport from 1986 to 1988. (Innovative Ex. 5).

64. Ms. Campbell has served in every year since 1982 as an Annual Career Day Instructor at Southern University in Shreveport. There she provides career counseling for students at Southern University. She has for several years narrated the programs on Black History Month for the Caddo Parish schools. She has been a church speaker, a judge in local pageants, science fairs, spelling bees, and many talent shows in the Shreveport area. She speaks every year at journalism classes of Louisiana State University-Shreveport on the subject of television. She reads annually at local elementary schools during the National Reading Month, usually at predominantly minority schools. She has performed public relations work for the Broadmoor Parent Teacher Association since 1988. She worked with Top Teens, a Shreveport organization to help minority teens, on media coverage in 1988. (Innovative Ex. 5).

65. From 1988 to 1989, Ms. Campbell served as board member and Chair of the Media Committee of the Shreveport Black White Task Force. The purpose of this task force is to improve relations between blacks and whites and to assist in Shreveport's transition to a majority black community. (Innovative Ex. 5).

66. Ms. Campbell is a member of the Sigma Gammon Rho Sorority, and served as its Goodwill Ambassador in 1988. This sorority assists the needy and the homeless in the Shreveport area, and Ms. Campbell participated in these activities. (Innovative Ex. 5).

67. Ms. Campbell is a member of the Benevolent Committee of the Williams Memorial CME Temple Church. She is a member of the Order of the Eastern Star and a member of the Teen Challenge Youth Ministries. The Teen Challenge organization works with teenagers who have problems with drugs or at school. She also performs local public relations work for this organization. (Innovative Ex. 5).

68. Mavice Colley Wallette was a principal of Caddo Parish public schools from 1968 to 1981. Shreveport is located in Caddo Parish. (Innovative Ex. 3).

69. Mrs. Wallette served one five-year term and one year of a second term on the Shreve Memorial Library Board in Shreveport. In this position, she has been active in providing programs for children. She has coordinated special exhibitions for children, and has worked with the librarians to present programs for the community of Shreveport. (Innovative Ex. 3).

70. For three years, Mrs. Wallette has been an active member of the Board of the Shreveport Chapter of the Diabetic Association. She participated in health fairs for this organization, distributed cookbooks for diabetics, solicited funds for a summer camp for children with diabetes, and promoted the activities of the Association. (Innovative Ex. 3).

71. In the 1970's, Mrs. Wallette founded the Northwest Louisiana Sickle Cell Anemia Foundation, Inc., headquartered in Shreveport. She has remained active in that organization, and is now an active board member of the group, involved in fund-raising and in programming for the Foundation's annual radiothon. She has worked for 16 years with the Director of Marketing on the radiothon, suggesting guests and promotions and working on the radiothon itself. (Innovative Ex. 3; Tr. 1321).

72. Mrs. Wallette has been an active member of the Shreveport Chapter of Links, Inc., a community service organization, since its founding 12 years ago. She was President of this organization from 1983 to 1985. She actively participates in the Links programs such as those sponsoring the bringing of disadvantaged children to cultural events and organizing health fairs. In 1983, the State of Louisiana awarded a grant to the Shreveport Chapter of Links, Inc., to conduct the Home-Work Hot Line. The hotline was available for area students to call for help with their homework. Mrs. Wallette acted as Chairman of this effort, wrote the grant proposal, and directed this program. (Innovative Ex. 3; Tr. 1377).

73. Mrs. Wallette founded and served for five years on the Caddo-Bossier Sponsoring Committee of the National Urban League, which sought to establish a Shreveport Chapter of the National Urban League. (Innovative Ex. 3).

74. Mrs. Wallette has been an active member of the Shreveport Chapter of the Delta Sigma Theta Sorority for more than 25 years.

75. Mrs. Wallette has served two two-year terms on the Board of the Central Branch YWCA in Shreveport. She assisted in the Board's capital drives, volunteered for the programs to assist battered women, and recruited new members. (Innovative Ex. 3).

76. Since 1974, Mrs. Wallette has been an active member of the Board of the Caddo Foundation for Exceptional Children in Shreveport. This Foundation sponsors, with the Allied Health Department of LSU Medical Center, a speech and hearing program for all ages, a language development center for youth, and the Molly Webb Speech and Hearing Center. (Innovative Ex. 3).

77. Mrs. Wallette is a charter and active member of the Greater Shreveport Optimist Club, which was organized in 1987. This organization is devoted to serving the youth of the community. (Innovative Ex. 3).

78. Mrs. Wallette has been Chairman of the Board for three years of the Martin Luther King, Jr. Health Center, a public health facility in a low-income neighborhood. (Innovative Ex. 3).

79. Mrs. Wallette is a founding member, and on the Board, of the Northwest Louisiana Family Crisis Center in Shreveport. She has been active in this organization for 10 years. The organization serves emotionally disturbed and abused children, providing counseling and a residential facility, and finding permanent homes for them. (Innovative Ex. 3).

80. Mrs. Wallette founded the Shreveport Foundation for Community Progress in the early 1980's, and remains active as a board member. She was instrumental in securing a grant for the Foundation to conduct the Young Men's Awareness Program -- a program that focused on young men's responsibility in reducing teenage pregnancies. She also supervised the Child Care Food Program. This program provides food for family day care in the Shreveport community. Mrs. Wallette served as interim Executive Director of the Child Care Food Program from August 1988 to April 1989. Mrs. Wallette writes proposals for grants. (Innovative Ex. 3).

81. In 1982, Mrs. Wallette was the volunteer Program Director and Coordinator for the Ralston-Purina On-the-Job-Training program. This program provided on-the-job training in local businesses for disadvantaged high school seniors. (Innovative Ex. 3).

82. Mrs. Wallette has actively served for the past three years on the Board of the Advisory Ecumenical Lecture Series. This organization sponsors interfaith lectures among Catholics, Protestants, and Jews on current religious, social, and political issues. Mrs. Wallette participates on the search committee for speakers, and wrote a successful proposal for a grant to finance the project. (Innovative Ex. 3).

83. Mrs. Wallette has served for three years on the Board of the Fair Park High School Cultural Series, under the auspices of Shreveport Parks and Recreation. The Board selects national artists for the cultural enrichment of students at Fair Park High School in Shreveport, a school which serves predominantly low income minority students. (Innovative Ex. 3).

84. From 1976 and 1989, Mrs. Wallette actively served on the Boards of several organizations in Shreveport. These organizations include: the Caddo-Bossier Association of retarded Citizens, which she represented at an international meeting in Montreal; the Caddo Board of Mental Health Association; Mothers Against Drunk Driving; the Family Crisis Center, for which she organized materials for educational programs about child abuse; the Mayor's Committee on Community Development Block Grants, which made recommendations to the Mayor as to use of Community Development Block Grants; Independent Horizons, an agency for handicapped persons; the Bicentennial Committee of Shreveport, for which she organized a music program featuring outstanding black artists; the Caddo-Bossier Day Care Association; the Shreveport Symphony, where she solicited memberships; the Governor's Commission on Children's Services; and the local Council on Aging. Mrs. Wallette was Chairman of the Shreveport Chapter of the National Council of Christians & Jews, and a member of Caddo Parish School System Citizens for Bond Issues Board. (Innovative Ex. 3).

85. Mrs. Wallette was Chairman, from 1987 to 1988, and is a current member of the Minority Mentor Council, an educational program for minority entrepreneurs. The Council conducts seminars and provides counseling on business planning, finances, and marketing. Mrs. Wallette has been active in organizing the Council and in recruiting mentors and advisees. (Innovative Ex. 3).

86. Mrs. Wallette helped start the parent group of the Vivacious Voguerettes in 1938, presently called the Voguerettes. This group is a women's social club that performs community service by, among other things, giving scholarships to high school seniors and making contributions to social service agencies. Mrs. Wallette has been an active member since 1938. (Innovative Ex. 3).

87. Mrs. Wallette was an active member of the Shreveport Chamber of Commerce from 1978 to 1980. She served on the Education Committee, which visited the Chamber of Commerce in Dallas, Texas, to evaluate its adopt-a-school program, a program that was then adopted by the Shreveport Chamber of Commerce. (Innovative Ex. 3).

88. Mrs. Wallette served for two years, in 1978 and 1979, on the Board of the Shreveport Chapter of the American Heart Association. She distributed literature throughout the community on prevention of heart attacks, and participated in awareness seminars for prevention of heart attacks. (Innovative Ex. 3).

89. Mrs. Wallette is active in her church. She is a founder of the GHJ Thibodeaux Memorial Library of St. Matthew African Methodist Episcopal Church. She currently serves on the Library Committee and is involved in setting policies for the library.

90. In 1988, Mrs. Wallette founded Shreveport 2000, a committee formed to plan for racial unity in Shreveport by the year 2000. (Innovative Ex. 3).

91. From 1988-1989, Mrs. Wallette was a charter member of the Shreveport Black Chamber of Commerce. She wrote the format for this organization. (Innovative Ex. 3).

92. Mrs. Wallette formed and acted as Public Relations Director of Mavice Colley Wallette & Associates, Inc., Marketing and Public Relations. Her work for this company was performed without fee as a community service. She gave advice to new businesses on public relations and marketing. (Innovative Ex. 3).

93. Mrs. Wallette serves on the Advisory Board of Security National Bank, a minority owned local Shreveport bank. The advisory board provides community input to the Board of Directors of the bank. (Innovative Ex. 3).

94. Mrs. Wallette helped start the Shreveport-Bossier Chapter Mothers Club. This organization is the forerunner of the local chapter of Jack & Jill of America, Inc. The purpose of these organizations is to promote activities for children under the supervision of their parents. (Innovative Ex. 3).

95. For two years, Mrs. Wallette has been on the Nominating Committee for the Board of the Pelican Council of Girl Scouts, the local governing board of that organization. (Innovative Ex. 3).

96. Mrs. Wallette serves on the Committee for Region VII of the Child and Adolescent Service System Program. This program was established by the state legislature to plan for funding implementation of legislation to assist emotionally disturbed adolescents in the Northwest Louisiana area, including Shreveport. (Innovative Ex. 3).

97. Martha Boone was Assistant principal in charge of Curriculum and Instruction at Southwood High School in Shreveport from 1973 to 1987. (Innovative Ex. 4).

98. Mrs. Boone has been a member of the Shreveport Chapter of the Delta Sigma Theta Sorority, Inc., a public service sorority, since 1962. She served as President, from 1978-1980, and Treasurer, from 1982-1984, of the Shreveport Chapter. She has worked on a number of public service projects of the sorority in Shreveport, including career orientation seminars for high school students, support for local Girl Scouts organizations, fund-raising for scholarships for students from the Shreveport area, programs to encourage high school girls to pursue higher education, fund-raising drives for the United Negro College Fund, and local health fairs. (Innovative Ex. 4).

99. Mrs. Boone has worked for many years at the Allendale Branch of the YMCA in Shreveport, which serves primarily the minority community in Shreveport. She has served as a member of the Committee on Administration and as a member of the Program Planning Committee. She presently serves as Vice Chairman of the Committee on Administration and Chairman of the Fundraiser Booth for the 1989 Red River Revel Festival. (Innovative Ex. 4).

100. Mrs. Boone has been a member since 1985, and currently serves as Financial Secretary for the Shreveport Chapter of Links, Inc., a public service organization that takes an active role in supporting the arts and in assisting disadvantaged youth in Shreveport. (Innovative Ex. 4).

101. Mrs. Boone has been a member of the Keithville Community Improvement Club, Inc., since 1968. She participates in activities of the club such as helping to solve problems that arise on local school buses, raising funds to build a children's community center, and sponsoring political candidate forums. (Innovative Ex. 4).

102. Mrs. Boone organized the Venture Club in 1986, with a seed grant from the Caddo Parish school system. The club sponsors talks with students by persons who have succeeded despite obstacles, provides counseling to the students, sponsors student meetings, and parent-student activities. (Innovative Ex. 4).

103. Mrs. Boone has been a charter member, since 1987, and serves on the Board of Directors of the Greater Shreveport Chapter of the Optimist Club, an organization dedicated to serving young people. (Innovative Ex. 4).

104. Mrs. Boone has been a member of the Shreveport Chapter of the Lupus Foundation of America since 1985. She was appointed to spearhead a fund-raising drive for Lupus research. (Innovative Ex. 4).

105. Mrs. Boone has been a member of the Jones-Hollingsworth Post 525 of the American Legion Auxiliary since 1986, and is assistant procurement chairman. In this organization she visits Shreveport area high schools to select students for the Louisiana Girls State, to sponsor those students' attendance at Girls State. (Innovative Ex. 4).

106. Mrs. Boone has been a member of the Shreveport Chapter of the NAACP since about 1958. She is an active member of the National Council of Negro Women and has been since about 1979. (Innovative Ex. 4).

107. Mrs. Boone has been a member of the Voguerettes Social Club of Shreveport since 1960, and has served twice as President. The club gives achievement awards to local high school girls to encourage them to study, and provides donations to charitable causes. (Innovative Ex. 4).

108. Mrs. Boone is a member of the Keithville Elementary/Middle School Parent Teacher Student Association. She serves as a school volunteer, and assists with the PTSA's activities such as welcoming new students, and participating in cookouts and dances for the children. (Innovative Ex. 4).

109. Mrs. Boone is a member of the Subcommittee on Education of the City of Shreveport Biracial Commission, which has met for several months to make recommendations to improve racial relations through education. (Innovative Ex. 4).

110. Mrs. Boone has been a member of the Lay Organization of the African Methodist Episcopal Church all of her life. (Innovative Ex. 4).

111. Mrs. Boone is involved in the Women's Missionary Society at the local, state, and district levels. She is a member and Immediate Past President of the North Louisiana Conference Branch of the Women's Missionary Society. She also served the Society, from 1978 to 1980, as the Historiographer-Statistician and as a Workshop Director from 1980 to 1984. She is currently President of the Eighth Episcopal District Women's Missionary Society which covers Louisiana and Mississippi. (Innovative Ex. 4).

112. Mrs. Boone has been a member of the Shreveport-Bossier Chapter of the Phi Delta Kappa since 1978. Phi Delta Kappa is a professional education fraternity. (Innovative Ex. 4).

113. Burnadine Anderson has been the Director of Communications for the Caddo Parish school system in Shreveport since 1977. (Innovative Ex. 7).

114. Mrs. Anderson has served, by appointment of the Mayor since its inception in 1984, on the Shreveport Women's Commission. The Women's Commission conducts public service projects and conducts surveys to determine the needs of women in the community. (Innovative Ex. 7).

115. Mrs. Anderson has been a member of the Shreveport Chapter of Alpha Kappa Alpha Sorority since 1979. This is a national black women's service organization. (Innovative Ex. 7).

116. Mrs. Anderson has been a member of the Shreveport Chapter of the Links, Inc., since 1985. The Links is a civic service organization, which sponsors activities such as counseling of disadvantages students and taking disadvantaged students to cultural activities. (Innovative Ex. 7).

117. Mrs. Anderson has served since Spring 1987 on the Red River Revel Board of Directors, on which she helps to manage the October arts festival held on the Red River in Shreveport. (Innovative Ex. 7).

118. Mrs. Anderson served on the Northwest Louisiana United Way Board of Directors from 1985 to 1987. From 1984 to 1985, she served on the Shreveport Boy Scouts Advisory Committee, which planned public relations activities for the annual Boy Scouts round-up night in local schools. From 1985 to 1986, she served on the Board of Directors of the Shreveport/Bossier Community Council, which sponsored community programs such as "Meals on Wheels." From 1984 to 1986, she served on the Shreveport Sesquicentennial Education Committee, which conducted programs such as production and distribution of coloring books for school children and a student news conference with the Mayor of Shreveport. (Innovative Ex. 7).

119. Mrs. Anderson served on the Board of the Shreveport Council of the Girls Scouts from 1979 to 1980; the Louisiana Public Broadcasting Advisory Committee in 1979; the Montessori School for Shreveport Board from 1979 to 1980; and the Caddo EXCEL Advisory Committee, as Secretary, in 1978. The purpose of the EXCEL Committee was to help prevent high school dropouts. (Innovative Ex. 7).

120. Mrs. Anderson has served on the Caddo District Parent Teacher Association Board of Managers from 1980 to the present. She is on the South Highlands Parent Teacher Association Board in Shreveport. (Innovative Ex. 7).

121. Mrs. Anderson was a consultant for the Shreveport Office of the Sickle Cell Anemia Foundation in 1978. (Innovative Ex. 7).

122. Since 1984, Mrs. Anderson has been a charter member of the Shreveport/Bossier Chapter of Jack & Jill of America, Inc., a non-profit organization dedicated to the cultural enrichment of children.

123. In 1984, Mrs. Anderson was the Education Session Chairwoman of Leadership Shreveport, a group of people around the age of 40, chosen for their leadership qualities demonstrated in the city. The Leadership Council is sponsored by the Shreveport Chamber of Commerce, and advises the Chamber, upon request, on community issues. (Innovative Ex. 7).

124. Mrs. Anderson is a member of the Board of the Shreveport Chapter of Volunteers of America, an organization which performs a large number of community services such as providing housing for pregnant teens and adoption services. She is also a member of the Minority Adoption Council. She helped sponsor activities throughout 1988-89 to bring attention to the need for adoptive homes for minority children. (Innovative Ex. 7). Mrs. Anderson also serves on the Shreveport YMCA Board of Directors. (Innovative Ex. 7).

125. Mrs. Anderson has been a member of the Caddo Association of Educators, the Louisiana Association of Educators, and the National Education Association from 1977 to the present. She was a member of the Public Relations Society of America, North Louisiana Chapter in Shreveport, from 1982 to 1987. (Innovative Ex. 7).

126. Mrs. Anderson is a member of Stoner Hill Baptist Church in Shreveport and has been all of her years in Shreveport. (Innovative Ex. 7).

127. Dr. Rosetta Reed has been from 1981 to 1983, and from 1985 to the present, first an Assistant, then an Associate Professor of business and marketing at Louisiana State University in Shreveport. In these positions, she has frequently been called upon to speak to Shreveport schools and organizations in Shreveport on business, education and marketing subjects. (Innovative Ex. 6).

128. Dr. Reed has served on the Women's Commission for Shreveport since 1987, and is currently a member of the Commission. The Commission focuses on women's issues in the Shreveport area. Membership is by appointment of the Mayor. (Innovative Ex. 6).

129. Dr. Reed has been a member since 1986 of the Interfaith Council for City of Shreveport, which examines social issues in the community such as teen pregnancy, drugs and crime. (Innovative Ex. 6).

130. Dr. Reed has been a charter member of the Shreveport Chapter of Links, Inc. since about 1971. Links, Inc. is a community service organization. As a member of Links, Dr. Reed participates in its activities such as taking disadvantaged children to cultural events and activities, sponsoring a Christmas party for disadvantaged children, fund-raising for programs to help the disadvantaged, and fund-raising for the United Negro College Fund. (Innovative Ex. 6).

131. Dr. Reed has, since 1987, acted as facilitator for the annual Economic Outlook Conference sponsored by Louisiana State University at Shreveport. The Conference provides business information to Shreveport area business men and women. (Innovative Ex 6).

132. From 1977 to 1987, Dr. Reed served on the Scholarship Selection Committee for the Southern Business Education Association. She helped choose outstanding business students from the Shreveport area colleges to receive scholarships. (Innovative Ex 6).

133. Dr. Reed has presented a number of workshops for Shreveport area groups. Among these were: "Retraining for Jobs of the Future" at the Shreveport-Bossier campus of the Southern University in April 1987; "Education, Economics and Empowerment: The Challenge of the 80s;" presented to Caddo Parish junior and senior high school students in March 1987; "How to Own and Operate a Small Business," presented to the Shreveport Chapter of the Theta New Sigma Sorority for Cosmetologists in March 1987; "The Quest for Excellence," presented to the National Honor Society of Green Oaks High School in Shreveport in April 1987; and in-service training seminars for Caddo Parish teachers in the late 1970's. (Innovative Ex. 6).

134. Dr. Reed is a member of the Board, and of the Executive Committee, of the Shreveport Chamber of Commerce. The Executive Committee is the policy-making body of the Chamber. Dr. Reed also serves as Chairperson of the Minority Business Council for the Chamber of Commerce. During 1988, she was a member of Futureshape 2000, the Shreveport Chamber of Commerce planning committee for the year 2000. (Innovative Ex. 6).

135. Dr. Reed is also a charter member of the Shreveport Black Chamber of Commerce, which she helped organize in 1988. This organization addresses the problems of minority businesses.

136. Dr. Reed was a member of the Advisory Committee for Security National Bank, a minority-owned bank, from 1987 to 1988. (Innovative Ex. 6).

137. Dr. Reed has been a member since its formation in 1988 of the 22-member Shreveport Mayor's Biracial Commission. Dr. Reed was also Chairperson of the Commission's Subcommittee on Education from 1988 through 1989. The Commission's objective is to identify community problems of minorities and work on solutions to these problems. (Innovative Ex. 6).

138. Dr. Reed was also appointed by the Mayor in 1988 to serve on the Shreveport Economic Development Foundation, the purpose of which is to stimulate business development in the Shreveport area. (Innovative Ex. 6).

139. Dr. Reed serves on the Community Advisory Committee for the Shreveport Job Corp Center. The Advisory Committee counsels the local Job Corp regarding recruitment, retention, and personal problems of the Job Corps' trainees. (Innovative Ex. 6).

140. Dr. Reed organized the Purchasing Network for Minority and Women Business Owners for Northwest Louisiana in Shreveport, an organization composed of Shreveport area chief executive officers and purchasing managers. This organization puts qualified minority and female vendors in touch with major purchasers in the Shreveport area. (Innovative Ex. 6).

141. Dr. Reed is a member of the Planning Board of the Allendale Branch of the YWCA. The Planning Board plans programs for disadvantaged minority youths and adults, such as day camp, swimming lessons, and practical education courses. (Innovative Ex. 6).

142. In 1988, Dr. Reed was a participant in the New Teacher Orientation Luncheon program for teachers new to the Caddo Parish Public School System.

143. Dr. Reed is a member of the Shreveport Chapter of the NAACP, an organization which addresses community concerns such as education and unemployment in the Shreveport community. (Innovative Ex. 6).

144. From 1975 until 1978, Gwendolyn Campbell was employed by KTUC/KFMM radio in Tucson, Arizona. At KTUC she was a news anchor, reporter, and account executive, and at KFMM she was the program director, a

disc jockey, and account executive. As program director at KFMM, Ms. Campbell was responsible for all music and commercial production. She also sold air time to local churches and businesses and hosted a weekly talk show. (Innovative Ex. 5).

145. From 1978 through 1980, Ms. Campbell worked at KWKH/KROK radio in Shreveport, Louisiana, as a news anchor and reporter. She spent six hours per day on-air, and the rest on the streets covering stories for this all news station. She also hosted a rotating morning talk/call-in show that was an hour every Saturday, and a public affairs show that was an hour about every third Sunday. (Innovative Ex. 5).

146. Since 1980, Ms. Campbell has been employed by KTBS-TV, in Shreveport, Louisiana, as education reporter, franchise reporter/producer, weekend news and weather anchor/producer, and morning anchor/producer. As education reporter, she covers education stories in the five-parish Shreveport area. (Innovative Ex. 5).

147. Ms. Campbell currently produces a weekly show called "People Who Care," devoted to the people in the Shreveport community who help others, but do not make the front page headlines. (Innovative Ex. 5).

148. From September 1988 to January 1989, Ms. Campbell also worked at KDKS radio in Shreveport-Benton, Louisiana, as the morning news anchor. She was responsible for the 1-1/2 minute morning news spots that ran every hour from 6:00 a.m. to 8:30 a.m. She was also part of a morning team with the on-air jock. She was responsible for her own writing and editing. (Innovative Ex. 5).

149. Burnadine Anderson has, in each year from 1981 through 1987, produced eight to nine 30-second public service broadcast television announcements. She wrote copy, directed shooting, produced, and edited these spots. She has also written 30-second public service announcements for radio and has performed radio announcements for local political candidates. In February 1989, Mrs. Anderson produced and anchored a one-hour televised telecommunications conference, transmitted to 15 universities and colleges on the East Coast, by the Caddo public schools to help recruit minority teachers. She introduced and interviewed guests and directed live telephone inquiries. From 1972 to 1976, Mrs. Anderson produced a local television news segment to recruit foster and adoptive parents. This segment was broadcast once a week. (Innovative Ex. 7).

150. Innovative will install an auxiliary power generation system adequate to allow the station to remain fully operational during electrical emergencies. (Innovative Ex. 2).

Caddo Broadcasting Limited Partnership

151. Caddo is a limited partnership owned as follows:

Name and Address	Position	Equity Holding
Green Broadcasting, Inc. Shreveport, LA	General Partner	22.22%
Paul C. Cox	Limited Partner	11.12%
Caddo Broadcasting, Systems, Inc.	Limited Partner	66.66%

(Caddo Ex. 1 at 1).

152. Ninety percent of the stock in Green Broadcasting, Inc. ("GBI") is owned by GBI's President, Claudette Green ("Green"), who thereby has a 20% equity interest in Caddo. Ten percent of the stock in GBI is owned by Paul C. Cox ("Cox"). Combined with his limited partnership interest, Cox thereby owns 13.34% of Caddo. Caddo Broadcasting Systems, Inc. ("CBS") is 50% owned by Michael Vizard ("Vizard") and 50% owned by Edward Gaiennie ("Gaiennie"), who each thereby have 33.33% equity interests in Caddo.

153. Claudette Green is a black female. (Caddo Ex. 3 at 1). She was born in 1957 in Shreveport and was raised there as well. (Caddo Ex. 3 at 1). She received a Bachelor of Science degree in Psychology from Southern University in Baton Rouge in 1978. Upon graduation, she worked in Birmingham, Alabama as a public relations/social services coordinator for the Community Health Service Federation (1978-1979), and taught English as a substitute teacher (1979-1980). She returned to Shreveport in 1980 and has lived there ever since.

154. Paul A. Cox was born on April 24, 1960 in Oklahoma City. (Caddo Ex. 4 at 1; Tr. 1303). He attended the University of Oklahoma, Central State University in Oklahoma City and received a Bachelor of Arts in Organizational Communications from Arizona State University in 1982. (Caddo Ex. 4 at 1). He is currently working toward his MBA at Centenary College in Shreveport. (Ex. 4 at 1; Tr. 1252).

155. From 1983 to 1986 Mr. Cox worked full-time on salary as an administrative assistant with L.R. Resources, II, a family oil and gas company. (Tr. 1267). He moved to Shreveport in January of 1984, (Tr. 1210), and has lived there since. (Caddo Ex. 4 at 6). From 1985 until the present he has been the President of Simmons-Cox Resources, Inc., a corporation participating in and operating several oil and gas properties. (Caddo Ex. 4 at 1). He is also the President of Town and Country Limousine of Louisiana, and of TCT Equipment Leasing, Inc., which operates Town and Country Taxi Company. (*Id.*) He is the Vice President and a Director of Ton Papier, LTD., a stationery business primarily operated by his wife and a manager. (*Id.*)

156. Michael Vizard, the 50% owner of CBS, the corporate limited partner in Caddo is an insurance salesman residing in St. Joseph, Louisiana. (Caddo Ex. 9 at 4, 15). Edward Gaiennie the other 50% owner of CBS, is a 50% owner and the Operations Manager of TCT Equipment Leasing, Inc. (Tr. 1248-50; KYMHILKYLAA Ex. 8 at 5).

157. Michael Vizard initially learned of the availability of the frequency from a Shreveport friend, Chuck Ellis. (Tr. 1212; KYMHILKYLAA Ex. 9 at 6-7). In late 1985 or early 1986, Mr. Vizard asked if Mr. Cox would be interested in pursuing the proposal. (Caddo ex. 4 at 2; Tr. 1212). At this time, the date of the filing window had not been set. (Tr. 1220). So that they would be ready when the window did open around March of 1986, Mr. Vizard retained a local counsel and Mr. Cox retained FCC counsel and selected an engineer recommended by counsel to learn about the process and some of the technical requirements. (Tr. 1216, 1218-20); Caddo Ex. 4 at 2). Mr. Gaiennie, who had also become involved with the group, contacted a site owner to arrange for a site. (Tr. 1221).

158. Messrs. Cox, Vizard, Gaiennie and Ellis initially formed the corporation, Caddo Broadcasting Systems, Inc. which later became Caddo's limited partner, in March of 1986 to pursue the proposal. (Caddo Ex. 4 at 2 Tr.

1215-16). Being aware of the FCC's preferences (Caddo Ex. 4 at 2-3; Tr. 1222), they also sought a minority investor to join them. (Caddo Ex. 4 at 2; Tr. 1222-24). They arranged for one experienced minority broadcaster to join them, but he later withdrew. (Tr. 1222-23; Caddo Ex. 4 at 2). Chuck Ellis moved to California and subsequently withdrew and sold his shares to the company. (Caddo Ex. 4 at 2; Tr. 1217, 1260). Mr. Vizard then moved from Shreveport to St. Joseph, Louisiana. (KYMHILKYLAA Ex. 9 at 15). The three remaining shareholders, Cox, Vizard and Gaiennie, desired to continue to pursue a station and were looking for a qualified minority woman who had experience in sales and radio (Tr. 1223, 1301; Caddo Ex. 4 at 2-3), but they planned on filing as a corporation even if they could not find a minority broadcaster to augment their group. (Tr. 1263).

159. Mr. Cox contacted an acquaintance in the radio and advertising business, and he recommend Claudette Green and another individual. (Tr. 1223-25; Caddo Ex. 4 at 3). Mr. Cox contacted Ms. Green and they met on August 3, 1987. (Caddo Ex. 3 at 1; Caddo Ex. 4 at 3; Tr. 1049-50, 1225). Mr. Cox explained the possibility of an application to Ms. Green, discussed the FCC preferences and indicated that they had been looking for someone who would qualify for the preference who had experience and could successfully run a business. (Caddo Ex. 3 at 1-2; Tr. 1050, 1226-27). Mr. Cox thought Ms. Green had all the qualities that the group was looking for (Tr. 1301), and felt that she would be ideal. (Caddo Ex. 4 at 3). Mr. Cox invited Ms. Green to join the group. (Caddo Ex. 3 at 2).

160. Ms. Green investigated the venture, inquired about Mr. Cox and asked her long-time friend, and attorney, Danny Malone, to look into Mr. Cox. (Tr. 1080-81; Caddo Ex. 3 at 2). Ms. Green learned that Mr. Cox was active in the community, a good businessman and a man of substantial financial standing. (Tr. 1183-84). Ms. Green then advised Mr. Cox that she was interested in the venture. (Caddo Ex. 3 at 2).

161. Ms. Green and Mr. Cox had several meetings and numerous conversations with Washington counsel and Danny Malone, Ms. Green's counsel, about the structure of the applicant and Ms. Green's role and interest. (Caddo Ex. 3 at 2; Tr. 1195). Washington counsel suggested that a limited partnership with Ms. Green as the general partner would be the best way to obtain the most credit under FCC policies and thus provide the best chance of winning the expected contest for the new station. (Caddo Ex. 4 at 3; Tr. 1071, 1231, 1264, 1300).

162. At this point the group anticipated that CBS would be the limited partner and that the three remaining shareholders of CBS would hold their interests through the corporation. (Caddo Ex. 4 at 3). On reflection, however, Mr. Cox felt that this structure would not really meet his needs, since he wanted to work at the station (Tr. 1234) and to learn about the broadcast business, and he understood that the FCC requires that a limited partner may not even communicate with the general partner about the business. (Caddo Ex. 4 at 3). He therefore asked counsel if there was any way that he could be involved without hurting Caddo's chances in a hearing and counsel agreed to explore it. (Caddo Ex. 4 at 3-4; Tr. 1234, 1300). Mr. Cox and Ms. Green also discussed it. (Caddo Ex. 4 at 4). The final structure with Mr. Cox owning a small interest in the general partner and having a separate small equity interest as a limited partner was suggested by counsel as the best way to meet the needs of the parties and to fashion a strong applicant under FCC policies. (Tr. 1047-48; Caddo Ex. 3 at 2; Caddo Ex. 4 at 4).

163. Ms. Green agreed to Washington counsel's recommendation of a limited partnership. (Tr. 1071). Washington counsel drafted the limited partnership agreement. (Caddo Ex. 3 at 2; Tr. 1071). The general partner became a corporation to limit Ms. Green's personal exposure to liability. (Tr. 1184; Caddo Ex. 3 at 2). Mr. Malone prepared the necessary corporate papers (Caddo Ex. 3 at 2), and Ms. Green personally paid him for the work. (Tr. 1062, 1184).

164. Because of her background in broadcasting Ms. Green was willing to commit to working full-time at the station if the application was granted. (Caddo Ex. 3 at 2). She is unable to commit substantial funds to the venture, although she has put more than $1,000 into GBI so far and put in her share of the funds necessary to meet GBI's expenses and paid for her personal attorney's fees. (Tr. 1056, 1184; Caddo Ex. 3 at 2-3).

165. After joining the venture, Ms. Green worked with Washington counsel in preparing the application (Tr. 1063, 1090-91, 1272), including reviewing Mr. Cox's balance sheet prior to certifying Caddo's financial qualifications (Tr. 1089-92). She also worked with two banks to arrange bank financing to replace Cox's commitment (Tr. 1081, 1185-86, 1192, 1278, 1280); set up checking, telephone and Federal Express accounts (Tr. 1082, 1200); and established the current public file. (Tr. 1058-59, 1236). She pays the bills, handled the newspaper publication of the filing of the application and has worked with counsel in all aspects of the litigation. (Caddo Ex. 3 at 3).

166. The funds for the expense of prosecuting the application have been paid out of a line of credit to Caddo, guaranteed by Mr. Cox. (Tr. 1185).

167. Neither Caddo, the general or limited partners, nor the principals of the general partner or corporate limited partner have any interest in or connection with any medium of mass communications other than the instant application. Claudette Green resigned from her position as an account executive with KEEL/KITT radio station on March 15, 1989, to take a position as staff assistant in the Shreveport office of U.S. Senator J. Bennett Johnston. (Caddo Ex. 1 at 2).

168. Ms. Green proposes to work as the full-time General Manager of the station. (Caddo Ex. 3). In that capacity, she will oversee all aspects of the station's operations. She will have department heads report directly to her and she will have ultimate responsibility for hiring and firing decisions. She will work with Paul Cox, who proposes to be the Business Manager, and will oversee the financial performance of the station. Ms. Green also proposes to be the Sales Manager and "will be heavily involved in that area."

169. Mr. Cox proposes to work as the full-time Business Manager of the station. (Caddo Ex. 4). In that capacity, Cox will be responsible for developing and implementing budgets together with the General Manager and for overseeing the station's financial performance. He will supervise the personnel handling bookkeeping and other accounting functions such as billing and collections. Mr. Cox will also be responsible for cash flow management and for supervising the relationship between the station and lenders and other creditors.

170. Ms. Green resides at 4307 Waters Place in Shreveport, Louisiana. (Caddo Ex. 3 at 7). This is her family's residence, and she has lived there most of her life and plans to continue living there in the event Caddo's application is granted. (Caddo Ex. 3 at 7). Other than three years at school in Baton Rouge, and approximately 1-1/2 years when she worked in Birmingham, Alabama, she has lived in Shreveport all of her life. (Caddo Ex. 3 at 7; Tr. 1039).

171. From 1985-1988 Ms. Green was appointed by the Mayor to the Shreveport Women's Commission which studies issues and prepares reports relating to the concerns of women in Shreveport. (Caddo Ex. 2 at 5). From 1986 to the present, she has been a member of the Youth Enrichment Program Board of Directors. (Caddo Ex. 3 at 5). This is an after-school academic enrichment program for children in kindergarten through fifth grade. Since 1986, she has also served as an appointed member of the Parking Ordinance Hearing Board and currently is its Chairman. (*Id.*) In 1989, she also became a member of the Fair Park Culture Services Board of Directors which sponsors local cultural events. (*Id.*; Tr. 1084-85). From Spring 1987 to 1988, she sat and was the parliamentarian of the Security National Bank Junior Advisory Board which, among other things, conducted workshops for the elderly in an indigent area, teaching them about consumer relations and banking services available to them. (Tr. 1084, 1198). She has been an active member of the Alpha Kappa Alpha Sorority since 1977, and was President of the local Delta Lambda Omega Chapter from 1986-1987. (Tr. 1087; Caddo Ex. 3 at 6). In early 1987, she was a Junior Achievement Advisor at Fair Park High School working with the students there. (Caddo Ex. 3 at 6). In the Spring of 1987, she was a member of the Mudbug Madness Festival Committee which puts on one of the area's larger civic celebrations. In 1987, prior to her involvement with the applicant, she also served as a member of the Downtown Development Authority Hotel Task Force which was seeking to promote a new downtown hotel-convention center. (Tr. at 1032).

172. From April of 1984 until March of 1989, Ms. Green was an account executive with stations KEEL/KITT in Shreveport. (Tr. 1042; Caddo Ex. 3 at 5). In this capacity, she was responsible for developing new clients by selling ideas for ad campaigns while servicing and maintaining existing advertising clients. (Caddo Ex. 3 at 5). She was also responsible for preparing budget proposals for advertising expenses and for advising clients of cost efficient approaches for achieving their goals. From August 1980 to March of 1984, she was the traffic manager for the stations. (Tr. 1042; Caddo Ex. 3 at 5).

173. Currently, Mr. Cox resides at 451 Linden Street, Shreveport, Louisiana. (Caddo Ex. 4 at 6). He has lived there since 1985 (Tr. 1211), and plans to continue to reside there. (Caddo Ex. 4 at 6). Prior to living at this address he resided at Fairfield Oaks Apartments in Shreveport from early 1984 when he moved to the city. (Caddo Ex. 4 at 6).

174. In 1985 Mr. Cox founded the Pit Krewe, a group of young patrons of the arts supporting and promoting the Shreveport Symphony and other groups. (Tr. 1283; Caddo Ex. 4 at 5). Since 1986 (Tr. 1210), he has been a member of the Board of the Meadows Museum, and in 1989 he joined the Board of the Shreveport Regional Arts Council. (Tr. 1284). In 1984-1985 (Tr. 1210), he was a member of the Louisiana Task Force for Higher Education. (Caddo Ex. 4 at 5). Since early 1987, he has been a board member of the Technical Coordinating Committee, the main planning committee for the Shreveport/Bossier city area responsible for planning for area transportation. (*Id.* at 6).

175. Caddo will have a complete auxiliary power system so that its transmission facility and studio can continue to function in case of an emergency. (Caddo Ex. 1 at 3).

III. CONCLUSIONS OF LAW

Opportunity Broadcasting of Shreveport

176. Opportunity receives 100% quantitative integration credit for the proposed full-time integration of Mr. Jefferson as the General Manager of the proposed station. The proposal is substantially enhanced by virtue of Mr. Jefferson's status as a black male. Mr. Jefferson's proposal to relocate to Shreveport in the event of a grant enhances the integration proposal slightly, as does the applicant's proposal to utilize auxiliary power. Finally, the integration proposal is very slightly enhanced by virtue of Mr. Jefferson's broadcast experience as an account executive with WLTS-FM, WYAT(AM), Slidell, Louisiana.

NTW, Inc.

177. The Federal Aviation Administration has determined that NTW's antenna proposal will not constitute a hazard to air navigation. The air hazard issue is resolved in favor of NTW.

178. Dolores G. LaVigne, Don L. Owen, and Pete Harris will each receive full quantitative integration credit for their proposals to work full-time in management positions at the proposed station. In order to fully effectuate her commitment, Ms. Lavigne will curtail her involvement with her other business activities, which are primarily passive investment interests, to which she devotes approximately six to eight hours per week. Mr. Owen presently serves as a Louisiana Public Service Commissioner, a part-time position. Although he presently devotes approximately 35-40 hours a week to the position, he explained that he does this because he has no other business duties and finds the work interesting. He believes that he can perform his Commission duties within a maximum time limit of ten hours per week, and this is what he proposes to do if NTW is granted the construction permit. He presently devotes one day per month plus four hours preparation time for attendance at Commission meetings in Baton Rouge, Louisiana, one day per month at a second Commission office in Monroe, Louisiana, and uses approximately ten hours per month traveling through his district. There is no evidence on this record which tends to contradict Mr. Owen's claim that he can perform his Commission duties within a maximum time limit of ten hours per week, and his integration proposal will be credited. Mr. Harris, the principal owner and manager of the Freeman and Harris Cafe, will terminate his position as the General Manager of the restaurant and will withdraw from its day-to-day management so that he may devote full-time to the operation of the proposed station.

179. NTW's integration proposal is substantially enhanced by the long-term local residence of each of its three principals, and substantially enhanced by their extensive participation in civic activities in Shreveport. The proposal is moderately enhanced by the female status of

Ms. Lavigne, NTW's 51% owner, and NTW receives a moderate enhancement for the minority status of its 20% owner, Mr. Harris. Finally, the proposal is slightly enhanced by the extensive broadcast experience of Mr. Owen and the scant broadcast experience of Ms. Lavigne, and is very slightly enhanced by NTW's proposal to utilize auxiliary power.

Port City Communications, L. P.

180. Port City's sole general partner, Mr. Larry English, proposes to work full-time, a minimum of 40 hours per week as General Manager of the proposed station. Port City is thus entitled to 100% quantitative integration credit. The integration proposal is substantially enhanced by Mr. English's status as a minority, and is also substantially enhanced by virtue of his long-term local residence in Shreveport. Mr. English's participation in civic activities in Shreveport enhances Port City's integration proposal to a slight degree. Very slight enhancement is awarded for Mr. English's broadcast experience, and the proposal is very slightly enhanced by Port City's proposal to utilize auxiliary power.

KYMHILKYLAA Broadcasting Company, Inc.

181. Mr. Hilry Huckaby, III, is the sole holder of 100% of the issued and authorized shares of KYMHILKYLAA's stock. He proposes to work full-time, a minimum of 40 hours per week, as the General Manager of the proposed station. Mr. Huckaby currently is a sole practitioner in the private practice of law in Shreveport. In order to fully effectuate his integration commitment, Huckaby will limit the amount of time he devotes to the practice of law to no more than ten hours per week, or if necessary, will cease the practice of law entirely in order to work full-time at the station. KYMHILKYLAA is entitled to 100% quantitative integration credit.

182. The integration proposal is substantially enhanced by Mr. Huckaby's status as a minority, and is also substantially enhanced by his long-term local residence in Shreveport. Mr. Huckaby's service on behalf of the NAACP Legal Defense Fund, and his service on the Shreveport City Council warrant a moderate enhancement for participation in civic activities. Finally, KYMHILKYLAA's integration proposal is very slightly enhanced by the applicant's proposal to utilize auxiliary power.

Innovative Women's Media Association

183. Innovative is entitled to 100% quantitative integration credit for its five general partners' proposals to work full-time, 40 hours per week or more on a daily basis in management level positions. The quantitative integration proposal is substantially enhanced by the status of each of Innovative's general partners as a minority individual, and is also moderately enhanced by virtue of the fact that each of its general partners is a female.

184. Four of Innovative's five general partners are long-term residents of Shreveport. The fifth, Mrs. Boone, is a long-term resident of Keithville, Louisiana, an immediately adjacent suburb of Shreveport, and within the service area of Innovative's proposed station. Innovative's integration proposal is therefore substantially enhanced by virtue of the long-term local residence of its general partners. The proposal is also substantially enhanced by the extensive and long-term civic activities of each of Innovative's general partners in Shreveport and in the surrounding area. Very slight enhancement is awarded for the broadcast experience of Innovative's partners Ms. Campbell and Mrs. Anderson. Finally, Innovative gains a very slight enhancement for its proposal to utilize auxiliary power.

Caddo Broadcasting Limited Partnership

185. Ms. Green proposes to work as the full-time General Manager of the proposed station. Mr. Cox proposes to work as the full-time Business Manager of the proposed station. Caddo is thus entitled to 100% quantitative integration credit. Caddo is controlled exclusively by its sole general partner, GBI. Ms. Green owns 90% of GBI, and Mr. Cox owns the remaining 10%. Accordingly, Green's 90% interest enhances the integration proposal substantially by virtue of her minority status, moderately because she is a female, slightly by virtue of her broadcast experience, and her long-term local residence combined with Mr. Cox' residence of a shorter duration enhances the proposal substantially; the participation of both in civic activities enhances the proposal moderately. Finally, Caddo is entitled to a very slight preference for its proposal to utilize auxiliary power.

IV. ULTIMATE CONCLUSIONS

186. Each of the applicants is entitled to 100% quantitative integration credit. Each of the applicants proposes to utilize auxiliary power. Except for KYMHILKYLAA, each of the applicants receives enhancement credit, ranging from slight to very slight, for broadcast experience.

187. Each of the integration proposals, except that of NTW, is substantially enhanced by minority participation. Mr. Harris' 20% minority participation enhances NTW's proposal to a moderate degree.

188. Each of the proposals, except that of Opportunity Broadcasting (which receives a slight enhancement for the promise of future residency) is substantially enhanced by the local long-term residence of its owners (90% in the case of Caddo). There are no preferences among them on this account.

189. Participation in civic activities by the principals of Innovative and NTW warrant substantial enhancement for each of those integration proposals, but the applicants are not equal in this regard. Innovative's civic participation is superior to that of NTW, and entitles Innovative to a comparative preference. Participation by Caddo principals in civic activities gains it a moderate enhancement, somewhat superior to the moderate enhancement awarded to KYMHILKYLAA on this score. Because of the recency of most of Mr. English's civic activities, Port City is awarded slight enhancement credit and Opportunity Broadcasting, with no credit for civic participation, comes last under this enhancing factor.

190. Innovative's 100% enhancement for participation by females entitles it to a moderate enhancement, and Ms. Green's 90% participation entitles Caddo to a moderate enhancement also. There is no preference between the two under this enhancing factor. NTW's Ms. Lavigne's participation also warrants moderate enhancement credit for that integration proposal, but the enhancement is less for NTW than for Innovative and Caddo.

191. Innovative leads in the overall ranking of these applicants because of its superior qualitative enhancements. Its enhancements for the minority status of its general partners, their status as females, and their long-term local residence and extensive civic participation make Innovative the preferred applicant herein. These enhancements outweigh the enhancements awarded to NTW and Caddo (second and third, respectively, in this ranking). KYMHILKYLAA is next in the ranking, followed by Port City, which is somewhat superior to Opportunity Broadcasting.

Accordingly, *IT IS ORDERED* that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of Innovative Women's Media Association *IS GRANTED*; the applications of Opportunity Broadcasting of Shreveport, NTW, Inc., Port City Communications, L.P., KYMHILKYLAA Broadcasting Company, Inc., and Caddo Broadcasting Limited Partnership *ARE DENIED*.[1]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTE

[1] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-305

In re Applications of

SHIRLEY MARCHANT File No. BPH-870429MD

For Construction Permit for a
New FM Station, Channel 298A
in Omega, Georgia

Appearances

James L. Oyster, Esquire, on behalf of Shirley Marchant; and *Gary P. Schonman, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
JOSEPH STIRMER

Issued: April 12, 1990; Released: April 20, 1990

PRELIMINARY STATEMENT

1. By *Memorandum Opinion and Order*, FCC 89M-1212, released April 19, 1989, the Presiding Judge granted the above-captioned mutually exclusive application of Shirley Marchant (Marchant) for a construction permit for a new FM broadcast station on Channel 298A at Omega, Georgia. Subsequently, by *Memorandum Opinion and Order*, 4 FCC Rcd 5241 (Rev. Bd. 1989), the Review Board, based on pleadings filed by the Mass Media Bureau (Bureau), ordered the record reopened and remanded the proceeding to the Presiding Judge for the adduction of evidence and the issuance of an Initial Decision on the following issue:

> To determine whether Shirley Marchant possessed "reasonable assurance" of her proposed transmitter site, in good faith, at the time she filed her application.

The burden of proceeding was placed on the Bureau, and the burden of proof was placed on Marchant.

2. On June 29, 1989, Marchant filed a "Petition for Leave to Amend" seeking to specify a new transmitter site. By *Order* of the Presiding Judge, FCC 89M-2065, released August 10, 1989, the "Petition for Leave to Amend" filed by Shirley Marchant on June 29, 1989, was HELD IN ABEYANCE, pending resolution of the site issue specified by the Review Board.

3. A prehearing conference on the added issue was held on July 25, 1989. Hearing sessions were held in Washington, D.C., on November 1, 1989, and November 22, 1989. On November 22, 1989, the Presiding Judge closed the record in this proceeding.

4. Proposed Findings of Fact and Conclusions of Law were filed by the parties by January 9, 1990.[1] Reply Findings were filed by both parties on January 29, 1990.

FINDINGS OF FACT

5. Marchant filed her application as an individual on April 29, 1987. (MMB Ex. 1, p. 2.) In her application, she proposed to locate her transmitting antenna on an existing tower located on the south side of U.S. Highway 319, 3.5 miles northeast of Omega, Georgia. (MMB Ex. 1, p. 16.) The tower was then and is now owned by Plant Telephone Company (Plant Telephone). (MMB Ex. 1, p. 22.) Plant Telephone is an independent telephone company with seven exchanges serving an area in southern Georgia. (Tr. 216.)

6. Marchant did not propose to use the tower at its existing height even though she would have been able to provide 70 dBu service to the entire community of Omega. (Tr. 331.) Rather, her application proposed to "extend the height of an existing 250 foot [Plant Telephone] tower to a height of 340 feet including the beacon" in order to maximize the coverage provided by her radio station. (MMB Ex. 1, p. 22.) Because the Federal Aviation Administration (FAA) subsequently objected to her proposal to increase the height of the tower by 90 feet, Marchant, on September 25, 1987, filed an amendment to her application wherein she proposed to increase the height of the tower by only 80 feet. (MMB Ex. 2, p. 10.)

7. Marchant's application to construct a new FM radio station in Omega constituted her first venture into broadcasting. (Tr. 145-146.) Consequently, she retained her brother-in-law, Stan Karas (Karas), an experienced broadcaster, to be her media consultant. (Tr. 146, 298-299.) Karas informed her about the availability of an FM channel in Omega as well as the April 30, 1987, deadline for filing her application. He also advised her to retain a broadcast attorney and a consulting engineer, to contact a bank to obtain credit approval, and to secure a transmitter site for her proposed station. (Tr. 146-150.)

8. Marchant began searching for a transmitter site in early April 1987. (Tr. 164.) She initially identified two sites that she considered using. (Tr. 165.) One site was owned by Marchant's mother, Ruby Gay, who stated in a declaration signed on May 26, 1989, that Marchant had discussed with her the possibility of using her parcel of land. (Marchant Ex. R-3, 1.) The other site was owned by Marchant's son-in-law, Ricky Baker, who similarly stated in a declaration signed on August 4, 1989, that Marchant had discussed with him the possibility of using his property. (Marchant Ex. R-5, 1.) Each site consisted of farm land which would have required Marchant to erect a new tower for her antenna. (Tr. 165.)

9. Marchant learned of the existence of the Plant Telephone tower when she was riding in a car with Karas who happened to observe the tower's red beacon in the distance. After driving to the foot of the Plant Telephone tower and getting a closer look, Karas advised Marchant that the tower would be the ideal location for her proposed station, and he urged her to inquire about renting space on the structure. (Tr. 166, 301-302.)

10. Marchant subsequently went to Plant Telephone's offices with the intention of speaking with the company's majority owner and president, Betty Gleaton (Gleaton). (Tr. 167.) In Gleaton's absence, Marchant raised the matter of renting space on the tower with Plant Telephone's supervisor, Ronnie Sturdivant (Sturdivant). (Tr. 167.) Sturdivant advised Marchant to speak with Plant Telephone's general manager, Danny Sterling (Sterling). (Tr. 167.) After his conversation with Marchant, Sturdivant advised Sterling that Marchant intended to speak with him about renting space on the Plant Telephone tower. (Tr. 226.)

11. According to Marchant, after the conversation with Sturdivant, she felt "good" about obtaining permission to use the tower because Sturdivant had told her Plant Telephone already had three antennas on the tower. (Tr. 168; MMB Ex. 4, p. 1.) Marchant assumed Plant Telephone rented space on its tower based on Sturdivant's comments to her that there were three antennas already on the structure. (Tr. 173-174.) In fact, the three antennas that are mounted on the Plant Telephone tower are all owned and operated by Plant Telephone, and Plant Telephone has never rented space on its tower to anyone. (Tr. 293.)[2]

12. Approximately one week later, Marchant arranged to meet with Sterling at his office. According to Sterling, he knew in advance that he could not grant Marchant's request. He, nonetheless, agreed to speak with her because he knew she was serving on the City Council in Omega where Plant Telephone maintains one of its telephone exchanges. He did not want to antagonize Marchant by summarily ignoring her. (Tr. 231-232.)

13. Marchant was accompanied by Martha Bryan (Bryan) when she returned to Plant Telephone's offices to speak with Sterling in mid-April 1987. (Tr. 170.) Bryan is a very close, long time, personal friend of Marchant. (Tr. 283.) She is also a friend of Sterling. (Tr. 227, 290.) Although Bryan had no prior broadcast experience or a personal stake in Marchant's proposed radio station, she agreed to help Marchant as much as she could because she wanted to see Marchant's application granted. (Tr. 286.)

14. According to Marchant, she told Sterling about her plans to apply for a new FM station in Omega, and that her media consultant believed the Plant Telephone tower would be the ideal location for her antenna. According to Marchant, Sterling said Plant Telephone did not see any problem renting space to her. (Tr. 171.) Marchant also claims that Sterling went so far as to agree to a rental fee of approximately $350 per month. (Tr. 175.) Marchant further maintains that upon her request, Sterling also agreed to provide a letter confirming her use of the Plant Telephone tower. (MMB Ex. 4, p. 3.) Bryan's version of the conversation is consistent with that of Marchant. (Marchant Ex. R-9, pp. 3-5.)

15. According to Sterling, Marchant stated that she needed to specify an existing tower on her FCC application, that it would look good to the FCC to have a tower already in place, but that "she would most likely use another" site. (Tr. 271-272; MMB Ex. 6.) According to Sterling, he informed Marchant during their meeting that she could not mount her antenna on the Plant Telephone tower. (Tr. 227, 233.) He explained to Marchant that Plant Telephone was considering using the available space on the tower for a cellular radio antenna, that an engineering study would have to be made, and that he was uncertain whether the tower could support another antenna.[3] (MMB Ex. 5.) According to Sterling, Marchant said that all she wanted was to reference the Plant Telephone tower in her application as her proposed transmitter site. (Tr. 227.) At that point, according to Sterling, he told Marchant that she "could do whatever [she] wanted to do" with respect to her application. (Tr. 262-263; MMB Ex. 6.) It was Sterling's belief that it was none of his business what representations Marchant made in her application to the Commission; that such matters were the concern of Marchant and her attorney. (Tr. 265-266.) Therefore, Sterling never told Marchant that he had no intention of leasing a part of the tower for her antenna, that she should not involve the Plant Telephone Company or its tower coordinates or name on the application that she was going to file with the FCC. (Tr. 265.) Moreover, when someone on Marchant's behalf later called Sterling to get the coordinates of the tower,[4] he freely gave those coordinates and never told the individual that Marchant could not use the site. (Tr. 265.)[5] According to Sterling, there was no discussion during the meeting about the cost of renting space on the tower or about preparing a confirmation letter. (Tr. 230; MMB Ex. 6.)

16. Sterling took the opportunity during his meeting with Marchant to tell her that he, too, was involved in an application for a new FM broadcast station at Omega that would be competing with Marchant's application.[6] (Tr. 194.) Sterling was an investor in an application organized by Sonrise Management Services, Inc. (Sonrise).[7] (Tr. 219-220.) Because his interest in the Sonrise-related application was merely for investment purposes, according to Sterling he did not give any thought to the fact that if Marchant's application was granted, the application in which he had a financial interest would necessarily be denied. (Tr. 234.) Sterling has no present desire to become involved in broadcasting, either in Omega or elsewhere. (Tr. 232.)

17. According to Marchant, about a week after their meeting, she telephoned Sterling to inquire about obtaining a letter confirming their agreement, and Sterling said he would "get on it." (MMB Ex. 4, p. 4.) However, according to Sterling, the only conversation about a confirmation letter he recalled was one that took place when Marchant telephoned him sometime in 1988, after Marchant had filed her application. (Tr. 192, 230-231.) Marchant, too, recalled the 1988 conversation. (Tr. 192-193.) Both agree that Sterling informed Marchant that he would not sign an agreement allowing her to use the Plant Telephone tower. When Marchant persisted in asking for a written agreement, Sterling told her that the only way he would sign such agreement is if she simultaneously signed a second agreement not holding him to it. (Tr. 231.) According to Sterling, he was trying, at that point, "to get rid of the lady" and end the conversation. (Tr. 231.)

18. Marchant admits that, although she proposed in her application to increase the height of the Plant Telephone tower, she never inquired of Sterling during any of her conversations with him whether Plant Telephone would approve any such tower modification. (Tr. 183.) Bryan, too, did not recall any discussions between Marchant and Sterling about increasing the height of the Plant Telephone tower. (Tr. 291.) It was Marchant's understanding that her consulting engineer, Robert L. Purcell (Purcell), "worked out all the arrangements" regarding her technical proposal. (Tr. 186-187.)

19. On April 22, 1987, Purcell telephoned Marchant's brother-in-law and media consultant, Karas, about Marchant's application. (Tr. 333.) Purcell asked Karas to contact Plant Telephone for the purpose of obtaining permission to increase the height of the tower and to specify the greater height in the application. (Tr. 335.) Karas specifically remembered Purcell asking him to obtain authority to apply "on paper" for 328 feet. (Tr. 335.)

20. As Purcell requested, Karas telephoned Plant Telephone and spoke to Sterling. (Tr. 335-336.) Karas testified to having told Sterling:

> [W]e would like to apply or go on file or on paper, to go to 328 feet, which is, as I understand it, according to our consultant engineer, pardon me, the maximum height that we can go with this Class A radio station. And I said would you find any problem now, I said you must understand that this is all subject to the FAA to the FCC and all various agencies approving that we can go to this height, there's no guarantee that we can, but it is my understanding through our consultant that we can at least apply for it. It doesn't mean we'll get it but we'd like to go on paper or on file to apply for it, at this present time.

(Tr. 338.)

21. During Karas' conversation with Sterling, there was no discussion about how Marchant's proposal to increase the height of the tower would actually be effected. (Tr. 339-340, 343.) Although Karas claims to have informed Sterling that Marchant would bear the financial burden of modifying the tower, his testimony on this point was somewhat vague, merely stating that he told Sterling that "we would probably, you know the expense, that we would take care of it or words to that effect, if we got approval." (Tr. 341.) Karas' "main concern" in speaking to Sterling was "to get his permission to apply on paper or on the application . . . of going to 328 feet." (Tr. 341.) According to Karas, Sterling expressed no objection to his request. (Tr. 338.)

22. According to Sterling, in his capacity as general manager of Plant Telephone, he did not have authority to approve a request to modify any of the company's towers. (Tr. 229-230.) Such a request would have to be directed to his superior, Betty Gleaton. (Tr. 230.) Sterling never told Marchant or Karas that he lacked authority. The Plant Telephone tower is 28 years old and is supported by guy wires. (Tr. 223-224.) Sterling believed that a major construction effort would be necessary to increase the height of the tower. (Tr. 224.)

23. Following Karas' telephone call to Sterling, Karas telephoned Purcell and, in Purcell's absence, left a message with Purcell's secretary about his discussion with Sterling. (MMB Ex. 9.) The message said, with regard to your question "on paper, increase to 328 feet. Mr. Sterling said he sees no problem as long as it passes necessary agencies." (MMB Ex. 9, p. 4; MMB Ex. 10, p. 2.) On the basis of Karas' message, Purcell prepared the engineering portion of Marchant's application proposing an increase in the height of the Plant Telephone tower. (MMB Ex. 10, p. 2.) Purcell never inquired of Karas whether Plant Telephone had granted permission to actually increase the height of the tower because he assumed the company had granted such permission. Purcell never spoke directly to Sterling. (MMB Ex. 10, 2.)

24. Marchant went with her consultant, Karas, to meet the Plant Telephone Company officials in 1988. (Tr. 177.) She took Karas, who is her brother-in-law, to meet them because he had just come to town, and she wanted him to know the people whose tower she intended to use as her transmitter site. (Tr. 177-178.) Marchant and Karas met with Sturdivant and Gleaton. During the meeting, Karas generally discussed the cost for renting tower space with Sturdivant. (Tr. 316-320.)

25. Shirley Marchant enjoys a good reputation in her community. A number of letters from members of the community were introduced into evidence. They stated that Marchant was "trustworthy," "honest," and a highly respected member of the community. (Marchant Ex. R-2.) Sterling acknowledged that Marchant has a good reputation in the community and is a "fine lady." (Tr. 255.) Betty Gleaton,[8] Rebecca McClellan (the general partner of an opposing applicant), and Ronald Sturdivant all confirmed that Marchant had a good reputation in the community. (Tr. 255.)

ULTIMATE FINDINGS AND CONCLUSIONS

26. The only issue presented for resolution is whether Shirley Marchant possessed "reasonable assurance" of her proposed transmitter site, in good faith, at the time she filed her application. The applicant would answer this question in the affirmative, whereas the Bureau concludes that Marchant lacked "reasonable assurance."

27. It is well established that an applicant seeking a new broadcast facility must, in good faith, possess "reasonable assurance" of a transmitter site at the time it files its application. *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1771-1772 (Rev. Bd. 1989); *Port Huron Family Radio, Inc.*, 4 FCC Rcd 2532, 2534-2535 (Rev. Bd. 1989). Moreover, the Commission declared in *Processing of FM and TV Broadcast Applications*, 58 RR 2d 776, 782 (1985):

> [A]lthough an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some reasonable assurance that the site for each proposed transmitting antenna is available. A mere possibility that the site will be available is not sufficient. *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose.

See also, Elijah Broadcasting, Inc., 65 RR 2d 461 (1988); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027 (Rev. Bd. 1983), *rev. denied*, FCC 84-119 (released April 2, 1984), *aff'd mem. sub nom., Royce International Broadcasting Co. v. FCC*, 762 F. 2d 138 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 995 (1985). An applicant's failure to possess reasonable assurance of site availability at the time it files its application is fatal to the application. *See, e.g.*,

62 *Broadcasting*, *supra*; *Port Huron*, *supra*; and *Webster-Fuller Communications Associates*, 3 FCC Rcd 6967 (Rev. Bd. 1988).

28. According to her application, Marchant intended to use a tower owned by the Plant Telephone Company. It was represented in her application that the Plant Telephone Company tower would be extended to a height of 340 feet from its present 250 foot height. There is no question that Marchant could have provided 70 dBu service to the entire community of Omega from the 250 foot tower. Nevertheless, the tower specified in Marchant's application was proposed to be raised to 340 feet on the recommendation of Marchant's engineering consultant to maximize coverage for comparative purposes.

29. The Bureau concludes that Marchant did not have reasonable assurance of the availability of the Plant Telephone tower; had not secured permission to raise the height of the tower; and, at most, only had the permission of Sterling to specify the Plant Telephone tower in her application, but no "reasonable assurance" to actually use the tower. In support of these conclusions, the Bureau relies upon the testimony of Sterling and calls him a "more believable" witness; that Marchant had a "mere two weeks" to complete and file her application, thereby apparently providing a motive for Marchant to falsely specify the Plant Telephone tower; that the existence of alternate sites was speculative; that the reason for specifying the Plant Telephone tower site was because it would be less expensive[9]; that Marchant was guilty of knowing and continuing misrepresentation; and that, even if the evidence does not conclusively demonstrate that Marchant lacked "reasonable assurance" of site availability, she should still be disqualified because she has not met her burden of proof.

30. The Presiding Judge does not see this case the way the Bureau does. Indeed, the Presiding Judges does not perceive a motive why Marchant would deceitfully specify the Plant Telephone tower. Other sites were clearly available for Marchant's use. (*See*, Marchant Exs. R-3, R-5.) Moreover, the Bureau places reliance on the fact that Marchant had only two weeks to complete and file her application. But FM broadcast applications nowadays are put together in days, not weeks. Thus, the time constraints argued by the Bureau do not provide a motive for Marchant to misrepresent.

31. While the Bureau would rely on the testimony of Sterling, it appears that he, perhaps unwittingly, misled Marchant. He told Marchant, when she asked to use the Plant Telephone tower as her transmitter site, to "do whatever [she] wanted to do." When Marchant's engineer called to get the coordinates for the site, he received full cooperation and was never told the tower site was not available. (Marchant Ex. R-4.) When Karas, Marchant's consultant, called to seek permission to raise the height of the tower, Sterling gave such permission as long as it passed necessary regulatory agencies.[10] The conduct on the part of Sterling must have mislead Marchant and her consultants into believing she had reasonable assurance of the availability of the Plant Telephone tower as her transmitter site.[11]

32. Marchant gave no indication during her testimony that she was not being truthful. Moreover, her testimony was corroborated by Bryan, her long time friend. While the Bureau would discount such testimony, the Presiding Judge finds no basis for rejecting the testimony of Marchant and Bryan. Indeed, Marchant is considered an outstanding member of the Omega community and enjoys a good reputation for honesty and integrity. This is not to suggest that Sterling deliberately testified falsely. Rather, it appears that there was a genuine misunderstanding between Marchant and Sterling. Marchant asked for and believed she received from Sterling permission to use the Plant Telephone tower as a transmitter site for her proposed FM station.[12] Sterling, on the other hand, thought that Marchant only wanted permission to specify the site in the application with no intent on her part to actually use the site. Such a misunderstanding does not translate to willful misrepresentation or deceit, and it does not justify the denial of Marchant's application. She believed, in good faith, that the Plant Telephone tower was available to her; unfortunately, her belief was mistaken. The issue[13] will, therefore, be resolved in favor of the applicant.[14]

Accordingly, IT IS ORDERED that the "Petition for Leave to Amend" filed by Shirley Marchant on June 29, 1989, IS GRANTED, and the amendment, specifying a new transmitter site, IS ACCEPTED;

IT IS FURTHER ORDERED that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules,[15] the application of Shirley Marchant (File No. BPH-870429MD) for a construction permit for a new FM station on Channel 298A at Omega, Georgia, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Administrative Law Judge

FOOTNOTES

[1] Shirley Marchant filed her Proposed Findings on January 8, 1990; the Bureau filed on January 9, 1990.

[2] When Marchant later met with Mr. Sterling, he identified the companies who had antennas on the tower, but the names were different from Plant Telephone. (Tr. 293-294.) Mr. Sterling told Marchant and Bryan that there were three antennas on the tower, *i.e.*, one for a paging service, one for a mobile phone service, and one for two-way radios. (Tr. 250.)

[3] Sterling was aware that Sturdivant told Marchant that he did not have any problem with her renting space on the tower, but that she would have to talk to Sterling. (Tr. 243.)

[4] Sterling gave Marchant the telephone number of the person to call to get the coordinates of the tower. (Tr. 188-189.)

[5] In his first declaration regarding his conversation with Marchant, Sterling stated, in part, as follows:

> Sometime before April 30, 1987, Shirley Marchant came to my business office and told me that she was filing an application for a new FM station at Omega. Marchant asked me if she could use a 310-foot tower owned by the Plant Telephone Company for her transmitter. I told her that other antennas were on the tower and that a cellular antenna may be added in the future. I also told her that I did not know if the tower could support an FM transmitter. Marchant then asked me if she could specify the

tower in the application she was going to file with the FCC. I told her that she "could do whatever you wanted to do." However, I never gave Marchant permission to use the company's tower.

(MMB Ex. 5.)

Sterling's version of his conversation with Marchant can hardly be considered a firm rejection of Marchant's request to use the tower.

[6] Sterling also raised with Marchant a city ordinance which, he believed, could place an undue hardship on the operation of the telephone company. (Marchant Ex. R-1, pp. 3-4.)

[7] Sterling acquiesced to investing nearly $5,000 in the application jointly with his wife after Mrs. Sterling was solicited by representatives of Sonrise Mangement Services, Inc., into joining the limited partnership. (Tr. 219, 234.) Sterling neither prepared the application, nor furnished any information that went into the application. (Tr. 221.) In fact, Sterling never saw the application in which he and his wife were limited partners. (Tr. 223.)

[8] Betty Gleaton is the principal owner of Plant Telephone Company and the mother-in-law of Sterling. (Tr. 167, 239.)

[9] Obviously, unless the tower was actually used, no cost savings would have been realized because Marchant would have had to build a new tower.

[10] The Bureau argues that Karas only sought permission to raise the tower height "on paper." But this is disputed by Karas who testified that he wanted permission to also use a higher tower because it would be ideal for the radio station. (Tr. 345.)

[11] As argued by Marchant in her pleading, it would have been "crazy" for Marchant to have specified the Plant Telephone tower and identify Sterling as the person who provided reasonable assurance when she knew that Sterling was a principal in a competing application.

[12] The first statement Sterling made regarding what he told Marchant does not constitute a firm rejection of Marchant's request to use the tower. (*See*, footnote 5.)

[13] The Review Board, in designating the issue, noted that it was "a close question." (*HDO*, *supra*, paragraph 9.)

[14] The Presiding Judge concludes that Marchant has met her burden of proof, and that the "preponderence of the evidence" establishes Marchant's belief that she had reasonable assurance and acted in good faith in specifying the Plant Telephone tower. The Bureau's arguments to the contrary are rejected.

[15] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-236

In re Applications of

Fenwick Island Broadcast Corporation & Leonard P. Berger d/b/a FENWICK ISLAND BROADCAST LIMITED PARTNERSHIP I	File No. BPH-850712ZD
FENWICK ISLAND COMMUNICATIONS, INC.	File No. BPH-850712ZE
GLORIA J. FERNANDEZ-PEREYO MERRYMAN	File No. BPH-850712ZI

For Construction Permit for a New FM Broadcast Station on Channel 221A at Fenwick Island, Delaware

ORDER

Adopted: March 28, 1990; Released: April 20, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. On March 26, 1990, Linda Tarr-Whelan and Allen Zack (petitioners) filed a petition for leave to intervene in this proceeding pursuant to 47 CFR 1.223(c).

2. Petitioners allege that they reside part-time near Fenwick Island, Delaware; that while travelling to and from their part-time residence they listen to the radio, and that they would expect to listen to any new station in that area. They seek to intervene for the limited purpose of participating in litigation concerning the March 6, 1990, settlement agreement filed by the applicants in this proceeding.

3. On March 14, 1990, after receiving responsive pleadings, the Review Board adopted a Memorandum Opinion and Order, FCC 90R-21, released April 2, 1990 approving the settlement agreement and terminating this proceeding. Thus, the petition for leave to intervene is moot.

4. ACCORDINGLY, IT IS ORDERED, that the petition for leave to intervene filed March 26, 1990, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Applications of

SHAWN PHALEN	File No. BPH-851231MO
ELLWOOD BEACH BROADCASTING, LTD.	File No. BPH-851231MS
SPIRIT BROADCASTING	File No. BPH-860102MZ
JAMES EVANS	File No. BPH-851231MR
CLAUDIA BRATTON	File No. BPH-860102MX

For Construction Permit for New FM Broadcast Station at Montecito, California.

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 1990; Released: April 20, 1990

By the Review Board: MARINO (Chairman), and BLUMENTHAL.

1. The Review Board has under consideration a joint petition for extraordinary relief filed March 13, 1990 by four of the five applicants in this proceeding, James Evans, Spirit Broadcasting, Shawn Phalen, and Ellwood Beach Broadcasting, Ltd. (Petitioners). Petitioners seek review of the ALJ's *Memorandum Opinion and Order*, FCC 90M-332, released February 21, 1990 which denied petitioners' request for financial misrepresentation and false financial certification issues against the fifth applicant, Claudia Bratton. Permission to appeal this ruling who also denied by the ALJ by *Memorandum Opinion and Order*, FCC 90M-433, released March 6, 1990.

2. Petitioners assert that this case is presently before the ALJ pursuant to the Board's *Memorandum Opinion and Order*, FCC 89R-82, released January 4, 1990, which remanded the proceeding on a financial qualifications issue against Bratton. Petitioners further state that the Board's action was premised on its analysis of evidence pertaining to a loan commitment relied on by Bratton from the Bank of Montecito which raised serious questions as to whether the Bank had been provided sufficient information upon which to make a commitment to finance the proposal. In support of their enlargement request (and attached to their appeal), petitioners submitted an affidavit of Jack Green, the Bank of Montecito official who issued a letter to Bratton, which allegedly disputed claims made by Bratton in this proceeding. Also relied on (and attached to the instant appeal) was an affidavit of another Bank official, Michael Orman, which petitioners assert also contradicted Bratton's claims. Beyond maintaining that the ALJ erred is not adding misrepresentation issues against Bratton, petitioners also argue that "the ALJ incorporated into his decision-making on the Petition his strongly felt views regarding the Board's errors in remanding the issue of Claudia Bratton's financial ability" (Petition at p.8), and they reference the ALJ's response to the Board's remand opinion as reflected in a *Further Prehearing Order*, FCC 90M-101, released January 18, 1990. Therein, the ALJ opined, *inter alia*, that "a financial qualifications issue looks to the future" (*id.*, at para. 8) and that "any discovery into Bratton's past financial certification and efforts is clearly inappropriate" (*id.*, at n.6). Petitioners maintain that the ALJ has engaged in a flagrant abuse of his discretion requiring reversal.

3. We will grant the requested relief in one respect only. It is well-settled Commission practice that where leave to appeal an ALJ's interlocutory ruling has been denied pursuant to 47 CFR 1.301(b), the ruling will be considered final unless egregious error or flagrant abuse of discretion is shown. *Communications Satellite Corp.*, 32 FCC 2d 533 (1971); *Ronald Sorenson*, 3 FCC Rcd 5022 (Rev. Bd. 1988); *Jan-Di Broadcasting, Inc.*, 93 FCC 2d 890 (Rev. Bd. 1983). And we have expressly held that the addition of hearing issues, which is entrusted to the ALJ by the Commission's rules, 47 CFR 1.243(k), is not a matter subject to extraordinary appellate relief. *Charisma Broadcasting Corp.*, 63 RR 2d 393 (Rev. Bd. 1987); *Jan-Di Broadcasting, Inc., supra*. By virtue of our remand order, Bratton's basic financial qualifications are already in issue and, as we have previously indicated in cases of this kind, it is unnecessary to consider remanding on collaterally-raised misrepresentation issues unless and until the underlying issue is resolved. *See Rockledge Radio, Ltd.*, 4 FCC Rcd 5092, 5093 (Rev. Bd. 1989); *62 Broadcasting, Inc.*, 4 FCC Rcd 1768, 1774 (Rev. Bd. 1989), *rev. denied*, FCC 90-48, released February 13, 1990. Accordingly, we will not at this time consider whether further hearing issues are required. Should it appear during the hearing on the financial issue that a misrepresentation or lack or candor occurred, the ALJ may (and should) add the appropriate issue(s).

4. In one important respect, however, it is necessary for the Board to intervene at this stage to grant relief in the form of clarification of our remand order and correction of an apparent misapprehension on the ALJ's part as to the scope of the intended hearing. Where the Board, as in this case, and the Commission have remanded proceedings on financial qualifications issues, we have done so on the understanding that the appropriate inquiry is whether at the time the applicant certified its financial qualifications it had reasonable assurance of the funds necessary to construct and operate its proposed facility. *See Opal Chadwell*, 4 FCC Rcd 1215 (1989); *Pepper Schultz*, 2 FCC Rcd 1476 (1987).[1] Here, however, the ALJ has suggested in his *Further Prehearing Order*, *supra*, as well as in a just-issued *Memorandum Opinion and Order*, FCC 90M-618, released March 26, 1990, at para. 4, that the financial issue in this case "looks forward," which would preclude examination of Bratton's financial commitment at the time of her application. This is egregious error. In order to avoid a likely reversal of the ALJ's supplemental decision in this case and yet a further hearing *de novo*, *see WWOR-TV, Inc.*, 4 FCC Rcd 6155 (1989), we grant the petition insofar as we direct that the issue added herein be to determine whether Bratton had reasonable assurance of

sufficient funds to construct and operate for three months *before* she certified her financial qualifications. *See Northampton Media Associates*, 4 FCC Rcd 5517 (1989).[2]

5. ACCORDINGLY, IT IS ORDERED, That the petition for extraordinary relief filed March 13, 1990 IS GRANTED to the extent indicated herein and IS DENIED in all other respects.[3]

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] In its *Opal Chadwell* remand, the Commission stated:

> In this regard, the ALJ would have to examine Chadwell's *original* proposal to determine whether she had a reasonable basis for making it. *See Pepper Schultz*, 2 FCC Rcd 1476 ¶¶ 3-4 (1987), *recon. granted on other grounds*, 3 FCC Rcd 1200 (1988).

4 FCC 2d 1217 (emphasis added); *see also Christina Communications, Inc.*, 2 FCC Rcd 1971, 1974 (1987). Unless Bratton had "reasonable assurance" of a bank loan when she so certified, she may not amend her financial proposal without meeting the six-point "good cause" tests of 47 CFR § 73.3522. *Pepper Schultz, supra*.

[2] In that regard, the Joint Petition appends the recent affidavits of the two individuals at the Bank of Montecito to whom Bratton spoke in connection which her alleged loan commitment: Michael Orman, then Vice President (Joint Petition, Attachment 6), and Jack Green their Assistant Vice President (*id.*, Attachment 4).

In his February 2, 1990 affidavit, Orman, in part, declares:

> To the best of my recollection, I met with Claudia Bratton, as a courtesy, on our about December 30, 1985 as introduced to her by Jack Green. To my knowledge, she had no previous commercial banking relationship with the Bank. And, to my knowledge she met with no other Bank officers or employees.
>
> * * *
>
> In that regard, she did not provide the Bank or Jack, or me with any personal financial statement or any personal financial information, for that matter. Moreover, she did not provide the Bank or me with a business plan for the proposed radio station, or cost estimates for the proposed station, in either oral or in written form.
>
> * * *
>
> My recollection of my impression from any brief meeting with Ms. Bratton and later discussions with Jack Green was that Ms. Bratton had this kind of fantasy dream that she was going to own and operate a radio station in Santa Barbara, and that she naively came looking to the Bank for a large loan without any supporting documents whatsoever that would allow the Bank to entertain such a request.
>
> * * *
>
> I have now had the opportunity to review Ms. Bratton's FCC application date-stamped January 2, 1986, and page 5 of that application and the information contained under the heading, FINANCIAL QUALIFICATIONS. In my opinion, in no way can the Bank be said to have provided her the "reasonable assurance" that she, as an applicant, was certifying to at that time, because we had nothing from her to make a determination that she would qualify for a loan from the Bank. Quite frankly, in reviewing Jack Green's letter of December 31, 1985 to her, I am surprised that a dollar figure was inserted in the letter (the actual amount was deleted in the letter I reviewed) since Jack couldn't have known a dollar amount in view of the fact that she had not provided the bank any of the necessary supporting financial information I mentioned previously. I suspect that Jack must have inserted an amount to accommodate Ms. Bratton.

In his January 19, 1990 affidavit, Green, in part, declares:

> I also told Ms. Bratton that, before the bank could give her any sort of commitment that it would actually make a loan, she would need to provide the bank with personal financial information and a business plan for the radio station so that the bank's loan committee could evaluate her qualifications for a loan.
>
> * * *
>
> Shortly after Ms. Bratton contacted me to discuss the sort of bank letter that she needed in connection with her FM application, she sent me a draft of the type of "reasonable assurance" letter that she said would help her with her application. In the covering letter that accompanied the draft "reasonable assurance" letter, Ms. Bratton stressed her understanding that (i) the letter she was asking me to provide to her could not be construed by her as indicating that the bank had made any determination as to her qualifications for the loan that she would need for the radio station, and (ii) before such a determination could be made, she would need to submit financial and other information sufficient to enable the bank to ascertain whether she met the bank's lending criteria. Based upon Ms. Bratton's written statement that she acknowledged that the "reasonable assurance" letter she was requesting could not be relied upon by her as any sort of commitment on the part of the bank to actually maker her a loan, I modified the draft "reasonable assurance" letter in certain respects, had it typed on blank stationery, signed it, and sent it to her. In providing her with a letter

substantially along the lines of the one she had requested, I did so as an accommodation to a potential customer and because I understood the letter as reflecting nothing more than the fact that the bank would be willing to consider a loan application from Ms. Bratton in the event she were successful in obtaining an authorization for the FM station.

Clearly the testimony of Orman and Green is relevant to the issue we have added.

[3] Because the hearing proceeding is in process, we have served pre-publication copies of this opinion on the parties and the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TUCSON COMMUNITY BROADCASTING, INC. Tucson, Arizona	**BC DOCKET NO. 79-58** File No. BPH-10,345
TUCSON FM BROADCASTING CORPORATION Tucson, Arizona	**BC DOCKET NO. 79-59** File No. BPH-10,347

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1990; Released: April 20, 1990

By the Commission:

1. In a Memorandum Opinion and Order, *Tucson Community Broadcasting, Inc.*, 4 FCC Rcd 6316 (1989), the Commission denied review of a Review Board decision, *Tucson Community Broadcasting, Inc.*, 2 FCC Rcd 568, recon. denied, 2 FCC Rcd 2860 (1987). The Board granted the application of Tucson Community Broadcasting, Inc. (Community) for a new FM station at Tucson, Arizona, and it denied a mutually exclusive application filed by Tucson FM Broadcasting Corporation (Tucson FM). Now before the Commission are a Petition for Reconsideration and a Petition to Reopen the Record or Dismiss the Application of Tucson Community Broadcasting, Inc., both filed September 15, 1989 by Tucson FM; Oppositions filed September 27, 1989 by Community; Comments filed September 28, 1989 by the Mass Media Bureau; and a Reply filed October 27, 1989 by Tucson FM.

2. The Review Board's grant of Community's application was based on its proposed service to white and gray areas from its Mt. Bigelow antenna site. Tucson FM's petitions do not contest the accuracy of those Commission findings. Rather, it argues that Community has a "covert plan to jettison Mt. Bigelow as an antenna site" and that the Commission should thus set Community's grant aside because it was obtained by fraud. It asserts that, based on Community's alleged misrepresentations with respect to the location of its antenna site, the Commission should reopen the record and either disqualify Community or dismiss its application.

3. Tucson FM argues that its allegations are based on newly discovered evidence evolving out of negotiations concerning a possible settlement of this proceeding starting in December 1987. During the course of those negotiations, John W. Teal, Tucson FM's president, told Thomas Rockler, Community's president, that he believed "the Mount Bigelow site presented engineering difficulties that did not exist at Tucson Mountain, [and he] . . . suggested to Mr. Rockler that he might wish to visit the Tucson Mountain site." Rockler visited the antenna farm on Tucson Mountain.[1] Teal alleges that Rockler was interested in changing sites and asked for more information about the antenna farm.

4. Tucson FM also has proffered a draft settlement agreement, prepared by Community's counsel and sent to counsel for Tucson FM in December 1988, which included the following language:

> WHEREAS, a Tucson FM principal has expended substantial funds and energy to develop an antenna site on Tucson Mountain ("Site") and desires that the said FM station on 107.5 MHz be located there . . . .

The draft agreement was never executed. Tucson FM argues, nonetheless, that the draft language shows Community's intent to abandon its Mt. Bigelow site.

5. Tucson FM submitted declarations from Teal and others stating that Community tried to condition a settlement on changing its antenna site to Tucson Mountain and that Community falsely tried to make it appear that the change in site was a result of Tucson FM's settlement demands. It argues that Rockler wants to move Community's antenna to the antenna farm so that it will be able to serve a larger, but less needy population and it concludes that Community never intended to build its antenna on Mt. Bigelow.

6. Based on its own allegations, admitting that it had known of Community's asserted site change for over nine months, Tucson FM's petitions are untimely and subject to dismissal under 47 C.F.R. § 1.106(b)(2)(i) and (ii). However, because of the seriousness of Tucson FM's charges, we have chosen to dispose of them on the merits so that there can be no doubt as to the propriety of the grant of Community's application in this proceeding. Interpreting these facts in a light least favorable to Community, Tucson FM has not established a basis for reconsideration or reopening the record. Tucson FM's allegations, even if true, fall short of establishing that Community has perpetrated a fraud on the Commission. The allegations indicate only that Community was considering changing its site as part of a settlement agreement. There are no allegations indicating that Community did not intend to build at Mt. Bigelow when it filed or during the time it prosecuted its application, or that it was not working toward construction of its antenna on Mt. Bigelow. S.G. Communications, the Forest Service permittee for the Mt. Bigelow site, has completed construction of its tower. In addition, on August 3, 1989, before the filing of the instant petitions by Tucson FM, Community requested permission from the Forest Service for access to the Mt. Bigelow site.

7. Moreover, the proposal to change the antenna site arose during the settlement negotiations and the Commission has held that it is permissible for applicants to depart from their comparative commitments as part of a negotiated settlement. In *Ruarch Associates*, 103 FCC 2d 1178 (1986), the Commission approved a settlement agreement which included the deletion of a divestiture commitment placed on the grant of a winning applicant's construction permit during the comparative hearing process. Thus, absent evidence of an attempt by Community outside of

the scope of the settlement negotiations to change its antenna site, there is no basis for either reconsideration or reopening the record in this proceeding.

8. ACCORDINGLY, IT IS ORDERED That the Petition for Reconsideration filed September 15, 1989 by Tucson FM Broadcasting Corporation, and the Petition to Reopen the Record or Dismiss the Application of Tucson Community Broadcasting, Inc., filed September 15, 1989 by Tucson FM Broadcasting Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Tucson FM proposes to use the antenna farm on Tucson Mountain. Teal developed the antenna farm. The antenna farm is now owned by his stepfather, Mark Yorston, and Robert F. Davis. Teal still works for the antenna farm as "site administrator."

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-132

In the Matter of

Competition in the
Interstate Interexchange Marketplace

NOTICE OF PROPOSED RULE MAKING

Adopted: March 8, 1990; Released: April 13, 1990

By the Commission: Commissioner Duggan not participating.

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I. INTRODUCTION

1. The Commission last completed a proceeding focusing on the effect of competition on its regulation of the provision of interstate long-distance services in the early 1980s. Much has changed since then. The AT&T divestiture removed local bottleneck facilities from

AT&T's control, and "1+" equal access is now widely available. Several of AT&T's competitors have constructed modern, nationwide high capacity transmission networks. Many other interexchange carriers (IXCs) have created regional transmission networks. In addition, recent developments in the high end marketplace have dramatically affected how large customers buy interstate long-distance service.

2. The time has come for an in-depth examination of the state of competition in the interstate long-distance marketplace today, and of the efficacy of our current regulatory framework in light of this competition. Based on a review of the information currently available to us, we tentatively conclude that competition has increased sufficiently to allow a gradual lifting of many of the constraints now binding AT&T's provision of interstate long-distance services. In particular, we propose to streamline our regulation, to the maximum extent possible, of services at the high end of the market. We believe these services to be the most vigorously competitive. We also propose permitting AT&T to make customer-specific offerings in certain circumstances and seek comment on two alternative mechanisms for doing so. We propose, as well, a transition to maximum streamlining for certain AT&T services that are apparently still subject to certain structural barriers to full competition. We also tentatively conclude that we should retain current regulatory safeguards for domestic MTS and ReachOut America, which are the primary services purchased by American residential consumers.

3. We hereby seek comment on whether, given the state of competition, these proposals strike the proper balance, or whether they go too far or not far enough, in effecting changes that will best ensure continued excellence in the provision of interstate long-distance services through maximum reliance on the forces of competition in the marketplace and minimal reliance on regulatory fiat. Interested parties are encouraged to provide detailed factual information within their control bearing on the state of competition and on the public interest utility or disutility of regulatory restrictions currently applicable to AT&T, as well as detailed legal analysis of our authority to implement our proposals or alternatives proposed in the comments. Only through a careful analysis of such information can we ensure that the reforms we adopt in this proceeding will best serve our statutory mandate to "make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide . . . communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151.

II. BACKGROUND

4. When Congress passed the Communications Act of 1934 (the Act), the telecommunications marketplace was vastly different from what it is today. Although the Commission never granted AT&T an exclusive franchise for the provision of interstate long-distance service, AT&T provided virtually all such service. In addition, through its affiliated Operating Companies, AT&T provided most local service and access to long-distance service. A number of independent telephone companies provided local telephone service and access in certain locations, but these companies depended upon AT&T for long-distance connections to other local companies, and thus effectively operated as cooperating partners with the Bell System.

A. *Competitive Entry into the Long - Distance Marketplace*

5. AT&T's virtual monopoly over long-distance telephone service in 1934 was the result of several factors that combined to make entry barriers prohibitively high for prospective entrants. Among these factors were: (1) AT&T's provision of most local telephone service (and state restrictions on local exchange competition), which gave rise to the possibility of discrimination and cross-subsidization; (2) the cost of laying transmission cable, which was technologically necessary to provide long-distance telephone service; (3) the need for new entrants to procure rights-of-way so that they could lay cable; and (4) AT&T's ownership of crucial patents for telephone technology.

6. Between the passage of the Act and the early 1980s, a number of developments dramatically reduced these entry barriers. Technological progress opened new avenues for telecommunications competition and lowered the costs of providing service. Commission policies, initially unreceptive to new competition, gradually changed, opening the door to new entry in limited market segments. The United States Court of Appeals for the District of Columbia Circuit opened the door further in the *Execunet* decisions.[1] In addition, new companies showed great persistence and skill in obtaining the resources and authority to enter the market.

7. By the early 1980s, the long-distance marketplace was still dominated by AT&T, but many of the barriers to effective competition had been drastically reduced. Moreover, several carriers provided long-distance services in competition with AT&T, and these carriers were slowly but surely expanding their presence in the market. In short, the stage was set for heightened competition in the provision of long-distance services.

1. *Microwave Service*

8. The simultaneous development of microwave and television technology was one of the triggering factors that led to competition in the provision of long-distance services.[2] Microwave technology was first developed just prior to World War II, and it was improved during the War, largely through military applications. At about the same time, RCA and others developed television technology, and when the War ended, the television market exploded. The rapid growth of the television industry created a significant demand for microwave systems, [3] and during the late 1940s, the Commission received several applications for microwave construction permits.

9. Initially, the Commission was somewhat inhospitable to new entry in the microwave field.[4] In 1959, however, in the *Above 890* proceeding, the Commission opened the door for some competitive provision of microwave by deciding that it would henceforth allocate spectrum to private microwave users, regardless of whether common carrier service was available to those users.[5] The Commission declined, however, to require broadly that common carriers interconnect with private systems, stating that interconnection would instead be addressed on a case-by-case basis. In addition, the Commission declined to authorize the sharing of private microwave systems. Thus, the *Above 890* decision opened the private system option to businesses that themselves could generate sufficient traffic between two discrete locations so as to justify the cost of constructing and operating a microwave system.

10. In 1964, Microwave Communications, Inc. (now MCI), filed an application with the Commission seeking §214 authority to construct a microwave network between St. Louis and Chicago to provide private line services on a common carrier basis. In 1969, after lengthy hearings, the Commission granted MCI's application.[6] Focusing largely on the specific merits of MCI's offering, rather than on the larger policy issues implicated by introducing new competition, the Commission concluded that MCI's proposed service offered usage flexibilities not available from AT&T, and thus might better meet the communications needs of particular users with "unique and specialized characteristics."[7] The Commission also found that LECs should be required to interconnect with MCI customers unless such interconnection was technically infeasible.

11. After its MCI decision, the Commission received a large influx of microwave applications,[8] and so initiated a Rule Making proceeding to establish an overall policy concerning new entry into the "specialized communications field." In its 1971 *Specialized Common Carriers* order, the Commission addressed at some length the potential economic effects of new entry by specialized common carriers in the private line market. It determined that increased competition would further the public interest, both by providing certain users with the choice of new carriers and by encouraging more rapid innovation by AT&T. The Commission also decided that LECs must, upon request, permit specialized common carriers to interconnect with LEC facilities.[9]

12. Following *Specialized Common Carriers*, several entities established microwave systems in competition with AT&T. MCI was the first, in early 1972, when it completed its St. Louis to Chicago system and began offering service between these two points. MCI quickly expanded its network by constructing new facilities and acquiring other small microwave carriers. Within two years its network reached forty cities spanning both coasts. Another entrant, Southern Pacific Communications Co. (the predecessor to US Sprint) also established a bicoastal microwave system by the end of 1973.

13. During the mid-1970s, the market share of AT&T's competitors remained quite low.[10] As of 1975, for example, AT&T's competitors accounted for only about 3-4% of all private line revenues.[11] Moreover, AT&T still retained its virtual monopoly in the provision of Message Telephone Service (MTS) and Wide Area Telephone Service (WATS), which together dwarfed AT&T's private line services. Thus, AT&T's competitors accounted for just a fraction of one percent of all telephone revenues at this time.

14. In 1976, the Commission prohibited tariff restrictions on the resale and shared use of private line services and facilities.[12] This decision gave further impetus to future private line competition and to the growth of so-called "value added networks," which had been authorized by the Commission three years earlier.[13]

2. *Satellite Service*

15. Improvements in satellite technology, coupled with Commission policies favoring the competitive provision of satellite services, further contributed to new entry into the long-distance market. Following the launching of the *Explorer* in 1958, satellite technology progressed rapidly. This progress reduced the cost of launching and operating satellites and thus made it economically feasible to use satellites for communications purposes. Moreover, because satellite research was conducted by a number of firms under Government sponsorship, no single entity controlled satellite patents or developed exclusive satellite expertise.

16. In 1972, the Commission announced that it would permit open entry into the domestic satellite field.[14] To encourage entry by specialized common carriers, the Commission temporarily prohibited AT&T from using satellite technology for non-governmental private line services.[15] The pro-competitive satellite policies reflected the Commission's determination that an open marketplace could best identify the merits of satellite technology as a communications medium and the kinds of uses to which it could be put.[16]

17. During the mid-1970s, several entities initiated satellite service. RCA was first, in 1974, when it leased satellite capacity from a Canadian satellite. The next year, RCA launched its own satellite, and four months later, a second satellite.[17] Western Union also launched two satellites around this time.[18] Two other entities -- Southern Pacific and American Satellite Corp. -- initiated satellite service by leasing satellite capacity and building their own earth stations. In addition, Comsat General launched satellites in May and July, 1976 for the joint use of AT&T and GTE Satellite Corporation.[19]

18. During the first years of satellite service, there was considerable dormant capacity on operational satellites. Technological and cost barriers were still high enough to preclude the widespread use of satellite technology for domestic two-way voice and data traffic. Only in densely populated areas were traffic volumes sufficient to justify the costs of large transmit-receive earth stations.

19. By the late 1970s, however, satellite operators had found a ready market for their services among distributors of cable television programming. Such distributors found satellite services cost-effective because one-way point-to-multipoint video transmission required the use of only one large earth station with several much less expensive receive-only earth stations. By the end of the decade, most of the satellites launched between 1974 and 1976 were filled close to capacity, and RCA, Western Union, and Comsat General had launched additional satellites. Moreover, in 1980, to accommodate the growing demand for satellite services, the Commission authorized construction of 25 new satellites, and the launch of twenty new or previously constructed satellites.[20] Included among the entities that received satellite authorization were existing licensees that sought replacement or additional satellites, and new licensees, such as Satellite Business Systems and Hughes Communications.

20. By the early 1980s, satellite technology had become an important communications technology, particularly for certain types of services. Moreover, the satellite industry was highly competitive, with several satellite providers effectively rivaling AT&T.

3. *MTS and WATS Competition*

21. A third significant development that opened the long-distance market to competition was the advent of MTS and WATS competition. Although microwave and satellite technologies had permitted new entry into the long-distance market, new entrants had initially limited themselves to private line, video, and other specialized services. Indeed, in authorizing competitive entry in the long-distance market, the Commission had not contem-

plated that new entrants would be willing or able to compete head-on with AT&T in the MTS and WATS markets. Rather, it assumed that new entrants would supplement AT&T service by offering specialized services to users with unique needs that were not being met by AT&T.

22. This assumption proved wrong when in September, 1974, MCI filed a tariff for a new service it called Execunet. MCI claimed that Execunet was a private line service, but it was in fact very much like ordinary MTS service in two respects: First, the bulk of the charges for the service were usage based, *i.e.* -- callers paid based on the time and distance of a call. Second, unlike ordinary private line service, Execunet calls did not have to be placed to a particular location, but, rather, could be placed to any city served by MCI.

23. After the Commission had rejected the Execunet tariff on the ground that MCI had not been authorized to provide services that were substantially equivalent to MTS or WATS,[21] the United States Court of Appeals for the District of Columbia Circuit reversed the Commission's finding that Execunet was unlawful. The Court held that §214 of the Communications Act requires carriers to receive prior authorization for new facilities, not for new services. The Court held that the Commission could incorporate service restrictions that are necessary in the public interest into a §214 certificate. Finding that the Commission had placed no such restrictions in MCI's §214 authorizations, however, the Court ruled that the Commission had improperly rejected MCI's Execunet tariff.[22] The next year the Court similarly reversed a Commission decision granting an AT&T petition for declaratory ruling that it was under no obligation to provide interconnection for Execunet service and that previous decisions requiring interconnection applied only to private line services.[23]

24. In 1980, the Commission formally adopted an open entry policy for all interstate services, including MTS and WATS.[24] The Commission fully embraced the concept of competition in MTS and WATS services, stating that competition and the elimination of entry barriers "will ultimately result in the provision of telecommunications service at the lowest possible cost; in the reduction or elimination of waste; in making carriers more responsive to the needs and desires of consumers; and, in making carriers respond more rapidly and efficiently to technological change and innovation."[25]

25. The Commission also decided in 1980 that it would prohibit tariff restrictions on the resale and shared use of MTS and WATS services.[26] This decision reduced entry barriers for the long-distance marketplace in two important ways. First, it reduced the capital requirements necessary for entry by permitting new entrants to offer regional or even nationwide service without constructing their own facilities. Second, it reduced the incentive of AT&T to engage in price discrimination to meet competition, thereby giving assurance to new entrants that they would be able to compete successfully in the marketplace.

4. *The Long - Distance Market in the Early 1980s*

26. In the early 1980s, AT&T remained preeminent in the provision of long-distance services, but the market share of its competitors was growing. Thus, in 1980, with combined revenues of approximately $1 billion,[27] other common carriers (OCCs) accounted for only about 3% of total interstate and intrastate long-distance revenues and a negligible share of the MTS/WATS market.[28] Their combined capital assets represented about 2% of gross communications plant.[29]

27. By 1982, OCC revenues had increased to $2.4 billion, and by 1983, to $3.7 billion. In addition, the number of OCC customers increased from 225,000 in 1980 to almost 4 million in 1983.[30] Nevertheless, confined largely to offering deeply discounted non-equal access services, OCCs continued to represent only a small sliver of the overall market. Thus, in 1982, AT&T's share of domestic toll revenues still approached 95%.[31] Moreover, the amount of new investment in interstate facilities by AT&T in 1982 alone equalled the accumulated investment to date of all of the OCCs combined.

28. Nevertheless, many of the entry barriers that had previously restricted competition in long-distance services, including both regulatory and technological barriers, had been eliminated or substantially reduced. Thus, the limited competition that had been introduced during the previous twenty years promised to grow stronger and more intense.

B. *Competitive Carrier Decisions*

29. In 1979, the Commission initiated the *Competitive Carrier* proceeding to adapt its regulatory policies to the changes that had been occurring in the telecommunications marketplace, including the emergence of nascent competition in the provision of switched voice services.[32] The *First Report*, adopted in 1980, established two classes of carriers, dominant and nondominant. It defined dominant carriers as those possessing market power and nondominant carriers as those lacking market power.[33] It retained traditional Title II regulation for dominant carriers, but adopted streamlined Title II regulation for nondominant firms on the ground that these firms lacked both the incentive and the ability to engage in the kind of anticompetitive practices to which Title II is directed.[34] Under streamlined regulation, tariffs could be filed on fourteen days' notice and were less likely to be suspended and investigated.[35]

30. The *First Report* classified two types of carriers as nondominant: specialized common carriers (with their expanding microwave networks and their newly-won ability to provide MTS/WATS as well as specialized services), and resellers of terrestrial services. It classified as dominant all other carriers, including AT&T, the independent telephone companies, and domestic satellite carriers and resellers.

31. In classifying AT&T as dominant, the Commission cited three factors. First, it noted that the Bell System controlled local access facilities for over eighty percent of the nation's telephones. It stated that control of essential bottleneck facilities is prima facie evidence of market power. Second, the Commission found that AT&T maintained an "overwhelming" share of the MTS and WATS market and that "the growing demand for long distance service and the current difficulties of entering this market on a large scale with alternative distribution facilities confer substantial market power on AT&T." Third, the Commission observed that AT&T's revenues for private line services were more than thirteen times the combined private line revenues of specialized common carriers.[36]

32. The *Further Notice*, adopted in 1981, tentatively concluded that the Commission was not required to apply traditional Title II regulation to all companies offering

basic communications services. The *Further Notice* suggested that under either of two approaches -- a "definitional" approach or "forbearance" -- the Commission could refrain from applying Title II regulation in certain instances. As described in the *Further Notice*, the definitional approach derived from the fact that in adopting Title II of the Act, Congress intended to regulate monopoly firms providing an essential service. The *Further Notice* suggested that, for purposes of Title II regulation, the term "common carrier" could be defined with reference to this purpose, particularly because neither the Act nor its legislative history defines "common carrier" in a meaningful fashion.[37] Forbearance was premised on the theory that the Act grants the Commission substantial discretion with respect to Title II regulation, including the discretion to refrain from applying Title II, so long as that discretion is exercised in a manner that effectuates, rather than frustrates, the Act's overriding goals.[38]

33. In 1982, the Commission stated that it would forbear from applying the tariff filing requirements of § 203 and the entry and exit requirements of § 214 to resellers of terrestrial services.[39] The next year, the Commission extended forbearance to specialized common carriers and all remaining resellers,[40] and in 1984, to all remaining domestic nondominant carriers.[41]

C. *Price Cap Regulation*

34. In 1987, the Commission initiated a Rule Making proceeding to reexamine its use of rate-of-return regulation for dominant carriers, including AT&T.[42] The Commission tentatively concluded that rate-of-return regulation had numerous flaws from a public interest standpoint for several reasons, especially the perverse incentives it provides such carriers. Rate-of-return regulation, the Commission tentatively determined, discouraged economically efficient behavior that results in cost savings, product innovations, and lower rates for consumers. In light of these drawbacks, the Commission proposed to replace rate-of-return regulation with price cap regulation as an alternative form of regulation for dominant carriers. Price cap regulation, the Commission tentatively found, would foster efficiencies by capping rates, not profits. In particular, by placing limits on the rates those carriers can charge for their services, price cap regulation tied carrier profit levels directly to their management of underlying costs and their responsiveness to consumer demand.

35. After issuance in 1988 of a *Further Notice* seeking comment on a detailed price cap proposal for AT&T and local exchange carriers (LECs),[43] the Commission decided in early 1989 that price cap regulation is better suited to the task of regulating those dominant carriers than is rate-of-return regulation.[44] It sought further comment on a modified price cap proposal for the LECs, and adopted a specific price cap plan for AT&T, effective July 1, 1989. Under that plan, most of AT&T's basic services are divided among three "baskets" of services. Those services used primarily by residential and small business consumers were placed in one basket. Because of certain unique structural barriers to competition in 800 service, AT&T's 800 services are grouped into another, separate basket. Most of AT&T's remaining services are in a third, business services basket. Several AT&T services -- including its Tariff 12, Tariff 15, and Tariff 16 services -- are outside of price cap regulation and thus remain subject to conventional tariff review.

36. AT&T tariff filings to change the rates for services under price cap regulation are subject to streamlined review so long as they satisfy all the price cap rules. The proposed rates for the services in a basket, for instance, cannot exceed the cap for that basket without being subject to more exacting tariff review. In addition, service categories within the baskets are subject to upper and lower bands. If AT&T proposes to reduce its rates for a service category more than 5% below the rate change permitted by that basket's cap, it must file on 45 days' notice and must show that the service covers its costs, which are defined as the average variable costs attributable to that service. AT&T must file tariffs for new services on 45 days' notice demonstrating that the service increases AT&T's net revenues from all price cap services, and must incorporate the service into the appropriate price cap basket within 6-18 months of introduction. Finally, AT&T also must file tariffs for restructured services within a basket on 45 days' notice showing that the new set of restructured services within the basket continue to satisfy all price cap bands.

III. COMPETITION IN THE LONG - DISTANCE MARKETPLACE

37. More than ten years ago, the Commission initiated the *Competitive Carrier* proceeding to adapt its regulatory requirements under Title II of the Act to the changes that had been occurring in the marketplace. At the time of the *Competitive Carrier* proceeding, competition was just beginning to emerge. In fact, competition in switched services, which represented the vast bulk of the market, was only a few years old. Generally, the market consisted of fringe firms competing with a vertically integrated AT&T. Some of these firms owned their own transmission facilities in various parts of the country, but even these firms relied heavily on purchase and resale of AT&T's long-distance services to provide the nationwide service deemed essential for commercial success.

38. In the years since the Commission initiated the *Competitive Carrier* proceeding, the interstate long-distance telecommunications marketplace has changed significantly. Vast structural and regulatory changes have been implemented, in large part to permit full and fair competition in interstate long-distance services. These developments, in turn, have helped precipitate changes in the market itself. We discuss these developments and the changes they fostered below.

A. *Fundamental Changes Affecting Competition Since the Competitive " Carrier Decisions "*

1. *The Divestiture*

39. The most far-reaching development, of course, has been the break-up of the vertically integrated Bell System as the result of a consent decree terminating a Government antitrust action. As a result of the implementation of the Modification of Final Judgment (MFJ)[45] and the divestiture of the Bell Operating Companies (BOCs), AT&T lost any ability to discriminate against its long-distance competitors through its control of bottleneck local interconnection facilities. As noted, this control had been a principal basis for the Commission's classification of AT&T as a dominant carrier in the *Competitive Carrier* proceeding. AT&T also lost any ability "either to subsidize the prices of its interexchange service with revenues from local exchange services or to shift costs from competitive

interexchange services."[46] These two practices -- discrimination and cross-subsidization -- were widely regarded as two of the principal vehicles by which AT&T could engage in anticompetitive practices.[47] Indeed, the MFJ Court predicted that "[w]ith the removal of these barriers to competition, AT&T should be unable to engage in monopoly pricing in any market."[48] More recently, the Court found that the development of interexchange competition in the seven years since the divestiture had, in fact, dissipated the monopoly or quasi-monopoly power that AT&T had at the time of the divestiture.[49]

2. Equal Access

40. Another major development during the last ten years has been the widespread implementation of "1+" equal access for interstate long-distance phone service. The initial impetus for equal access came from the MFJ and the GTE Consent Decree, which required the BOCs and GTE, respectively, to provide all IXCs with access that is "equal in type and quality" to that provided to AT&T.[50] The Commission implemented and expanded these requirements.

41. Equal access not only ensured that IXCs would receive equal transmission quality, but also that callers would have the opportunity to presubscribe their telephones to an IXC other than AT&T. Before the advent of equal access, all interstate MTS calls dialed on a 1+ basis were routed to AT&T.[51] A caller could reach an OCC only by dialing a seven-digit phone number, as well as an often-lengthy identification code, prior to dialing the called number. Equal access enabled callers to select a carrier other than AT&T to provide them long-distance phone service on a simple "1+" dialing basis. Moreover, the balloting process through which equal access was implemented educated customers as to the availability of alternative suppliers of telecommunications services and encouraged them to make a choice among IXCs.[52]

42. Equal access also offered OCCs other benefits. For example, it enabled them to identify the phone number of the originating party for billing purposes, as well as determine when a call had been terminated. This gave OCCs the ability to provide detailed billing statements and other billing features that are highly valued by large business customers. In addition, equal access made it possible for OCCs to offer service on rotary as well as touchtone phones.

43. In the *MTS and WATS Market Structure* proceeding,[53] the Commission extended equal access obligations to the non-GTE Independent Telephone Companies. Specifically, it required them to convert all end offices equipped with stored program control switches within three years of the receipt of a reasonable request by an IXC for equal access services.[54] It required them to convert end offices with electromechanical switches to equal access as soon as practicable and in accordance with specific guidelines.[55] In addition, the Commission prescribed different access charges for equal access interconnection (termed "premium access") and non-equal access interconnection.[56] This rate differential served both to offset the advantage AT&T had by virtue of its superior interconnection arrangements before implementation of equal access, and to establish reasonable transitional rates during that implementation.[57]

44. Other steps taken by the Commission in furtherance of equal access included: establishing detailed interconnection and transmission standards through the access tariff process; establishing allocation procedures for customers that failed to select a primary IXC through the balloting process; and directing carriers to establish a forum for the industry to address equal access problems.[58]

45. Since these decisions, there has been a gradual, but steady transition to equal access across the country. On January 1, 1984, when the divestiture became effective, there were no equal access telephone lines. By the end of 1985, 43% of the nation's access lines, consisting almost entirely of lines served by the BOCs, had been converted to equal access. One year later, two thirds of all access lines were equal access lines, including 38% of all Independent Telephone Company lines and three fourths of all BOC lines. Today, approximately 93% of the nation's access lines have been converted to equal access, including 95% of BOC lines and over four fifths of all Independent Telephone Company lines.[59]

B. ***Competition in the Interstate Long - Distance Marketplace***

46. The divestiture by AT&T of the BOCs and the implementation of equal access precipitated significant changes in the telecommunications industry. As noted above, prior to these developments, most regulatory barriers to long-distance competition had been removed. The divestiture and equal access removed the principal structural barriers, thereby paving the way for heightened long-distance competition. In fact, since the MFJ, the long-distance industry has changed dramatically, becoming much more competitive. Based on the information currently available to us, we believe that AT&T now faces effective rivalry for most of its interstate services, and most especially, its business services.

1. Interstate Services Generally

47. We analyze the state of competition in long-distance telecommunications services based on several factors. These factors include market share and changes therein; supply capabilities of participants in the market; the financial strength of market participants; barriers to new entry; demand elasticities; and the relative size, power, and sophistication of various purchasers of interstate telecommunications services. We consider all of these factors, and focus heavily on the relative supply capabilities of various long-distance service providers because, as discussed below, we believe that this consideration appears particularly important in telecommunications markets. We request comment on the relative importance of the factors incorporated into our analysis and on any other factors that we do not here address.[60]

48. One factor that is frequently relied upon in measuring the competitiveness of a market is market share. We therefore begin our market analysis by noting that AT&T's overall share of the interstate market appears to be between just under 65% and just over 70%, depending on the measurement criteria used. We further note, however, that AT&T's market share has declined substantially during the past five years. For example, from the third quarter of 1984 to the fourth quarter of 1989, AT&T's share of switched interstate access minutes fell from 84.2% to 64.4%.[61] Indeed, during this time, while AT&T's competitors enjoyed an annual growth rate in traffic volume of 32.1%, AT&T's growth rate was only 7.6% percent, well below the industry average of 13.2%.[62]

49. Similarly, AT&T has faced a decline in its share of industry revenues. As noted above, in 1980, OCCs accounted for only about 3% of all long-distance revenues (including LEC revenues). In 1984, AT&T's net long-distance revenues of $34.9 billion exceeded 90% of the industry total (not counting LEC long-distance revenues). At the end of 1988, AT&T's share of toll service revenues had fallen to about 75%.[63] Moreover, according to some sources, as of mid-1989, AT&T's share of net long-distance revenues had dropped to about 71.6% and was declining at a rate approaching four percent a year.[64] We seek further information on market share, both for the market as a whole and for the various groups of interstate services provided by IXCs.

50. Although market share may be a suitable starting point for measuring the competitiveness of a marketplace, a number of economists have argued that market evaluation methodologies should not rely exclusively on market share,[65] but should consider other factors, such as supply and demand elasticities. They argue that a high market share does not necessarily confer market power.[66] We tentatively conclude that an analysis of the long-distance telephone market based solely on AT&T's market share at a given point in time would be too static and one dimensional. Therefore, while we by no means ignore market share data in assessing the interstate telecommunications marketplace, we consider this data only in conjunction with other factors.

51. One such factor, which we believe may be more indicative of the level of competition in the interstate long-distance market, is the relative supply capabilities of competitors in the market. Relative supply capabilities allow an assessment of supply elasticity, which refers to the ability of competitors in a market to meet additional demand, beyond that which they currently meet. [67] Supply elasticities are important because even if one company enjoys a very high market share, it will be constrained from raising its prices above cost if its competitors have, or could easily acquire, the capacity to serve its customers at current price levels.[68]

52. We tentatively conclude that the supply capabilities of various competitors in the interexchange market are so high as to greatly reduce the feasibility of sustained monopoly pricing by any one participant. First, there are a large number of IXCs that currently offer competitive long- distance services. Indeed, approximately 300 carriers purchase equal access service from the BOCs.[69] Moreover, these carriers serve a broad cross-section of areas. At least four IXCs purchase equal access in every state for which we have data, and in forty of these states, at least nine IXCs purchase equal access.[70] More than fifteen IXCs purchase equal access in two thirds of these states, and more than twenty-five in several of them.[71]

53. While many of these IXCs are regional carriers, some of them offer competition on a nationwide basis. Thus, AT&T's two largest competitors -- MCI and Sprint -- purchase equal access in every state. Another seven IXCs purchase equal access in 25 or more states, and another four in at least ten states. Although the other IXCs purchase equal access in fewer than ten states, most, if not all, provide nationwide service from the area in which they operate.[72]

54. Collectively, these IXCs offer a full range of high quality services that would appear effectively to rival those provided by AT&T.[73] MCI and Sprint, for example, provide virtually every service that AT&T currently offers.[74] Moreover, a number of IXCs, including MCI and Sprint, have engaged in intensive capital investment programs that should not only allow them to operate on a cost-effective basis well into the future, but which also vastly expands their supply capacity. Indeed, as a result of these programs, AT&T now owns about 44% of all IXC fiber optic miles and about 38% of all IXC fiber optic route miles.[75] More significantly, AT&T's competitors now have so much transmission capacity that it would seem that they could handle substantial additional traffic with relatively little additional investment.[76] Of course, their ability to do so would depend not only on their absolute capacity but on the geographic distribution of their capacity. We note, in this regard, that US Sprint has extended its fiber optic network into every local access transport area (LATA) in the nation and that MCI plans fiber deployment in 107 points of presence. We seek further information on the geographic distribution of OCC supply capacity, as well as the costs OCCs would have to incur in order to handle various levels of additional traffic, given their existing supply capabilities.

55. We tentatively believe that the substantial unused transmission capacity in the interstate market is particularly significant and indicates why market share data in itself may not paint an accurate picture of the state of competition in the long-distance market. Most markets are not characterized by the kind of excess capacity that appears to exist today in the long-distance telephone market. In other markets, firms with relatively small market shares would not be well-positioned to capture large numbers of their rivals' customers if their rivals chose to price above competitive levels. The smaller firms would simply not be able to accommodate the excess business without dramatic capital expansion. In the telecommunications market, by contrast, MCI, Sprint, and other carriers, such as the NTN network, would appear to stand ready and able to accept vast amounts of additional traffic in the relatively short-term. Indeed, because these entities seem to have so much unused capacity, it would appear that their marginal costs of serving additional customers would be quite low. This, of course, would make them compete all the more vigorously in the marketplace. At the same time, the efficiency of their fiber optic networks equipped with new electronics would seem to enable them to operate on a cost-effective basis, even with their apparent substantial excess capacity. We now seek comment on the underlying cost structures of AT&T and its principal competitors.

56. Indeed, notwithstanding their excess capacity, both MCI and Sprint have dramatically increased their profitability in recent years and seem to have established themselves as viable long-term competitors in the marketplace. Thus, MCI turned a $498 million 1986 net loss into net earnings of $64 million in 1987, and $558 million in 1989.[77] During this same period, MCI's operating revenues steadily increased, growing from $3.6 billion to $6.5 billion.[78] Sprint, as well, has enjoyed significant increases in revenues during the past few years, with its 1988 revenues tripling its 1984 revenues. Moreover, Sprint posted its first net quarterly profit in 1989, and with its fiber optic network now substantially in place, its future profitability is likely to increase.[79] Indeed, both MCI and Sprint are well-positioned to compete successfully with AT&T in years to come because their largely new networks consist of the most up-to-date technology. As stated by MCI in its 1988 Annual Report: "We are approaching

the point where adapting our network is not a question of construction, but of reprogramming.... We are in an excellent position to lead the industry into the era of network intelligence because our network is virtually new. More than 80 percent has been constructed in the past four years, using the most advanced technology available."[80] The same, of course, would apply to Sprint with its all-new fiber optic network, and other IXCs that have recently constructed state-of-the-art facilities.

57. Finally we note that once capacity is installed, it is effectively sunk investment. Thus, even if an existing facilities-based carrier exits the interstate market, its supply capacity likely will remain available to other IXCs and new entrants. So long as the technology underlying this capacity remains viable, this capacity may well be attractive to other IXCs. Indeed, a successor likely would be able to acquire and use these facilities for long-distance transmission at lower cost than the exiting firm, thereby enabling the successor to become a more efficient competitor than the exiting firm. Thus, the supply elasticities that currently characterize the long-distance market likely will prevail well into the future.

58. Based on these considerations, we tentatively conclude that there is significant competition in the interstate market generally and that competitive forces are likely to strengthen and become even more pervasive over time. Before we address competition in various services, we note that this tentative conclusion pertains even to remote exchanges in which AT&T is currently the only carrier providing any long distance service. In these exchanges, which represent a very small share of the total market, AT&T's market power is constrained by two factors. First, geographically averaged rates ensure that prices charged by AT&T in these exchanges are the same it charges elsewhere. Thus, even in remote, rural areas where AT&T is currently the only available long-distance carrier, callers will reap the benefits of lower prices that result from more competitive markets elsewhere. Second, the threat of competitive entry constrains AT&T's ability to raise prices above competitive levels in these remote areas. Thus, if there were significant profits available in remote exchanges served only by AT&T, other IXCs would quickly enter those markets. Indeed, the lack of competitive entry in these isolated markets may well be an indication that AT&T is pricing its service in remote, rural areas at reasonable, competitive levels.

2. *Business Services*

59. While the factors discussed above with respect to competition for interstate services generally apply, as well, to services used primarily by business customers, there are other factors that lead us to conclude that competition among IXCs in business services[81] may be especially intense. These factors include the sophistication of business customers; their relative bargaining power in the marketplace; as well as certain demand elasticities that are unique to the marketplace for business services. Moreover, the available evidence indicates that competition among long-distance companies is, in fact, most vigorous in the business services marketplace. Based on these considerations, we tentatively conclude that competition for business services is substantial enough to require revisions in our regulatory policies for these services.

60. One factor that distinguishes the marketplace for services used primarily by business customers from the marketplace as a whole is that large business customers tend to be better informed and more sophisticated in their evaluation of their telecommunications alternatives than other customers. Indeed, one 1985 survey found that ninety percent of businesses with 500 or more stations, and eighty percent of businesses with 250-500 stations, hired telecommunications consultants.[82] We would expect that these percentages would be as high or higher today. Through the expertise that these consultants offer, business customers can effectively evaluate the full range of competitive market options available to them.

61. Another significant factor unique to business services is that large business customers generally have substantial bargaining power. A very small percentage of business customers accounts for a relatively large percentage of all interstate business telephone service revenues.[83] As a result, large business customers are particularly valuable to IXCs, and competition for their business tends to be especially vigorous. Indeed, large businesses often wish to take full advantage of this competition by using the sealed bid procedures they use to buy other factors of production as their method for purchasing the telecommunications products and services that best meet their needs at the best possible prices.

62. Evidence of the bargaining power of large business users is provided by the fact that AT&T has renegotiated at least five of its Tariff 12 offerings prior to the expiration of these agreements. Indeed, AT&T has modified its first and fourth Tariff 12 option three times each; it has twice modified its second Tariff 12 option, and it has revised its third Tariff 12 option four separate times. While these revisions cover a wide range of tariff provisions in addition to rates, AT&T has characterized these changes as responsive to customer preferences and/or competitive incentives. We believe that the ability of Tariff 12 users to renegotiate long-term agreements in midterm indicates that these users have substantial bargaining power in the marketplace. Of course, this also evidences the availability of viable competitive alternatives to AT&T's offering.

63. The bargaining power of large business customers derives not only from their sheer size and the amount of telephone revenues they generate, but also their ability, in many cases, to substitute their own private networks for public switched or even private line services. In 1985, according to one source, expenditures for private networks reached $5.3 billion, and the number of private microwave network operators virtually tripled between 1978 and 1986.[84] In addition, a number of large corporate users, particularly those with dispersed operations, such as hotel/motel chains, currently operate private satellite networks.[85]

64. For these reasons, one would expect competition among IXCs for large business customers to be particularly intense. Indeed, this appears to be the case. For example, one study, conducted in September 1988, found that AT&T's market share among businesses spending $1000 or more per month had fallen to 46.1%, and that MCI and US Sprint had market shares of 19.5% and 13.3%, respectively, among such customers.[86] Another study, conducted in May 1989, found that among 375 large businesses with average annual communications budgets of just under $2.5 million, 52% used AT&T as their primary long-distance provider; 17.2% used MCI; 16.1 used Sprint; and 14.7% some other carrier.[87] This same study also found that the average communications budget of businesses identifying MCI as their primary

carrier was somewhat larger than the average budget of customers identifying either AT&T or US Sprint, and that customers choosing MCI as their primary carrier tended to route a higher percentage of their traffic to their primary carrier than customers choosing another carrier as primary carrier.[88] On the other hand, the survey found that AT&T was most often the secondary carrier when either MCI or Sprint were identified as primary carrier. Another study, reported in early 1988, corroborates these data. That study, which involved large business, educational, utility, and government users, found that only 3.5% of those surveyed had no plans to use a vendor other than AT&T for at least some of their telephone service.[89]

65. AT&T's price levels under price cap regulation provide further evidence of strong competition in business services. In particular, AT&T has been pricing its services in the business services basket at levels well below applicable price cap ceilings.[90] We believe that these lower-than-required prices for Basket 3 services are a reflection of competition in the marketplace for these services.

66. Further evidence of the intense competition that centers around large customers can be found in the numerous recent trade press accounts documenting the success of MCI, Sprint, and others in attracting large business and government users.[91] These accounts reveal that many large users are, indeed, both willing and able to shift their business to carriers other than AT&T and that it is not uncommon for large business users to divide their traffic among several carriers. For example, last year, Westinghouse Electric Corp. signed a five-year contract with MCI to be its primary carrier. Under the contract, MCI eventually will carry two-thirds of Westinghouse's traffic, with the rest divided between AT&T and US Sprint.[92] Similarly, General Electric recently contracted with MCI for virtual private line and 800 services, despite purchasing other service from AT&T pursuant to Tariff 12.[93] This practice of dividing traffic among carriers would appear to increase each carrier's incentive to provide low-cost, high quality service to the customer, since the ongoing relationships that the customer has with other carriers make it easier for the customer to shift more or all of its business to the other carriers.

67. In addition to Westinghouse and General Electric, several other large users reportedly made MCI their primary long-distance carrier in 1989. For example, Merrill Lynch & Co., Inc. awarded MCI a five-year contract reportedly worth $150 million. In addition, Chase Manhattan Bank, which spends in excess of $100 million per year for telecommunications services and products, made MCI its primary carrier for its domestic and international voice and data traffic,[94] as did Citicorp., in a three-year $80 million deal.[95] Also in 1989, Chrysler Corp.,[96] Montgomery Ward,[97] K mart Corp;[98] McDermott, Inc.,[99] Northwestern Mutual Life Insurance Co.,[100] and Georgia Pacific Corp.[101] signed multi-million dollar contracts with MCI. Other large customers reportedly contracting with MCI last year include Aetna Life & Casualty, which made MCI its primary long-distance carrier;[102] Stuart-James Co., which signed a multiyear $27 million deal with MCI;[103] Progressive Casualty Insurance Co., which entered into a three-year agreement valued at $27 million;[104] and the United States Congress, which awarded MCI a two-year $20 million contract.[105] This by no means represents a complete list of large customers that chose MCI for substantial portions of their long-distance business in 1989. Rather, it is just a sampling, as reported in the media. But this information underscores just how effective MCI's competition has been in the marketplace for large users.

68. Sprint's competitiveness in large business services is also evident from trade press accounts. For example, in early 1989, it was reported that Sprint signed a multimillion dollar contract by which it replaced AT&T as primary carrier of long-distance voice service for Sears Technology Services.[106] It was also reported that Contel Office Communications signed a long-term contract with Sprint worth an estimated $10 million per year.[107] Later in the year, Sprint announced multimillion dollar deals with PepsiCo[108] and Apple Computer,[109] a three-year $23.4 million contract with Grand Metropolitan plc,[110] and a three-year $18 million contract with Greyhound Lines.[111] Other large business customers reportedly contracting with Sprint in 1989 include Zenith Electronics Corp., in a deal reportedly worth $1 million per year;[112] Grubb & Ellis, in a multiyear contract said to be worth $3 million per year;[113] Lockheed Dataplan;[114] and Automatic Data Processing, Inc.[115] In addition, Florists' Transworld Delivery (FTD) reportedly chose US Sprint to handle the estimated sixteen million 800 service calls it currently receives per year.[116] And, in December, 1988, Sprint won substantial portions of the contracts for the United States Government's FTS-2000. As a whole, these contracts are potentially worth $25 billion over ten years.[117]

3. *800 Services*

69. 800 service is an interexchange service in which subscribers agree in advance to pay for calls made to certain numbers. 800 service is purchased primarily by medium and large-sized business customers that tend to be sophisticated in their market choices and that possess some degree of purchasing power. To this extent, 800 services are similar to business services as a whole and would tend to be characterized by a high level of competition. On the other hand, the fact that 800 numbers are today not "portable" reduces the competitiveness of the provision of 800 services.

70. Number portability refers to the ability of an 800 subscriber to use any IXC with a particular 800 number. Currently, due to unique access requirements presented by 800 service and technical limitations in the LECs' networks, 800 numbers are not portable.[118] This means that 800 subscribers cannot change carriers without also changing their 800 number. It also means that prospective subscribers that seek to use a particular 800 number (for example, a number that spells their name or product) must take their 800 service from a particular 800 carrier. The BOCs and several independent telephone companies have developed a new access system for 800 service that permits 800 number portability, but that also, at least in the short-term, substantially increases call set-up time for most 800 calls. Because of these call set-up delays, the Commission has not permitted the LECs to substitute this new form of access for the current NXX access system.[119]

71. The lack of number portability for 800 numbers appears today to remain a barrier to full competition in the 800 market. Some of the largest 800 customers use verbally significant 800 numbers or invest substantially in marketing their 800 numbers. The lack of number portability significantly limits the ability of these customers to respond to price and service changes in the 800 market. This limitation exists with respect to all 800 customers,

regardless of their carrier, but may bestow an undue advantage on AT&T, which still provides more than 80% of all interstate 800 services. In addition, AT&T's large embedded customer base enables it to offer prospective 800 customers a greater choice of 800 numbers than other IXCs and therefore may give it an advantage over other IXCs in competing for new customers.[120]

72. On the other hand, it is not entirely clear how significant a barrier the lack of number portability may be to full competition in 800 service. For example, some 800 customers, such as customers that use their 800 numbers for internal purposes only, may not place as much importance on retaining or obtaining a particular 800 number. Moreover, because the 800 services market has been growing at a rate of fifteen to twenty percent per year, competition for new customers over time may reduce the significance of barriers to full competition in the market for embedded 800 service customers. In particular, to the extent that AT&T's averaged prices enable existing customers to reap the benefits of lower prices and better services that result from the competitive market for new 800 service customers, the unavailability of number portability may be of less importance.[121] We therefore seek comment on the extent to which the provision of 800 service is becoming substantially competitive and the importance of number portability to full competition. Parties should also address the impact, if any, of the competitiveness of 800 services on competition elsewhere in the interstate interexchange marketplace.

4. *International Services*

73. We also seek comment on the extent of competition in the marketplace for international telephone services to and from the United States. In order to provide international MTS (IMTS) to and from a foreign country, a carrier must obtain an operating agreement with the telecommunications administration of that country. Without such an agreement, the carrier cannot handle terminating traffic from that country, and it can deliver calls to that country only by reselling the services of a carrier that does have an operating agreement. In the past, the Commission has expressed concern that AT&T's principal competitors had far fewer operating agreements than AT&T and were thus precluded from competing effectively in large segments of the international market.[122]

74. This situation, however, appears to be rapidly changing. In the past few years, both MCI and Sprint have been able to obtain operating agreements for virtually all of the major international telecommunications markets for which they previously lacked authority. Indeed, AT&T now faces facilities-based competition from at least one OCC in 19 out of the top 20 markets, and from more than one in most of these markets.[123] Moreover, most countries for which AT&T has the sole operating agreement have only minimal amounts of communications with the United States. Thus, a key structural barrier to full and fair competition in the international market appears to have been greatly reduced.

75. At the same time, however, MCI and Sprint have only just initiated service in many major international markets, and AT&T's overall share of international minutes and revenues for 1988 remained at close to 90%.[124] Consequently, it may be premature to view the international market as fully competitive at this time. For these reasons, we seek comment on the extent to which international service is now competitive, including whether any barriers to full and fair competition in the provision of this service remain. In addition, we seek comment on the extent to which any remaining advantage that AT&T may have in providing international service affects competition for domestic residential and business services.

5. *Operator Services*

76. Operator services[125] represent a significant component of interLATA telephone service. Approximately 18% percent of all interLATA calls and 25% of interLATA revenue (excluding private line, WATS, and 800 calls) are attributable to "0" service.[126]

77. More than 90% of dial "0" calls fall into one of three categories: calling card (50%), collect (33%), and third number billing (8%).[127] Because these calls are not billed to the originating line, they generally must be validated before they are routed. For example, carriers must validate calling card numbers to ensure that the number presented is valid and that the card has not been reported as stolen. They validate collect and third number calls to ensure that the call is not billed to a non-billable line, such as a public payphone line. Most IXCs will not route a "0" call that they cannot validate.

78. Competition in interstate dial "0" service is closely linked with competition in the payphone market. Indeed, a significant percentage of all dial "0" interLATA calls originate from payphones -- approximately 45% from LEC-owned public payphones and an additional percentage from private payphones. Although we lack data on this point, it seems likely that consumers dial a substantial portion of their dial "0" calls on a 0+ basis."[128] Thus, being the IXC for 0+ calls dialed from payphones is important to being competitive in the provision of dial "0" services generally.

79. Prior to 1989, AT&T automatically received all 0+ interLATA calls dialed from LEC payphones. Callers could reach an OCC's operator service only by dialing 10XXX, or a 950 or 800 number. In 1989, pursuant to separate orders of the MFJ Court,"[129] the BOCs and GTE implemented presubscription plans for their payphones. These plans enable premises owners to presubscribe their BOC and GTE payphones to a carrier other than AT&T. Thus, OCCs may now compete for the right to receive 0+ traffic from BOC and GTE payphones.

80. The MFJ Court also required the BOCs and GTE to make available to all IXCs by January 1, 1989, the same validation data that they make available to AT&T, on the same prices, terms, and conditions. This mitigated an advantage that AT&T had enjoyed by virtue of the Plan of Reorganization implementing the MFJ. Under the Plan, the Billing Validation Application (BVA) data base used by the Bell System to validate "0" calls was assigned to AT&T, subject to interim sharing arrangements with the BOCs. By virtue of these sharing arrangements, AT&T and the BOCs were able to validate and accept each other's calling cards. Indeed, in most cases, AT&T and the BOCs assigned the same calling card number to a particular customer, making the two cards indistinguishable for practical purposes."[130] Prior to the Court's order, no other IXC was able to validate a BOC calling card. Now, all OCCs, like AT&T, may validate and accept BOC calling cards.

81. Implementation of these decisions has enhanced the OCCs' ability to compete with AT&T for dial "0" traffic from payphones. IXCs offer premises owners commissions

on 0+ traffic in exchange for presubscription rights. Premises owners have an incentive to choose for their payphone the IXC that is likely to result in the largest total commission (based in part on the amount of 0+ traffic that the IXC can accept). Thus, the ability of OCCs to validate the widely available BOC calling card appears to be crucial to their ability to compete effectively in the presubscription process. [131]

82. These decisions did not, of course, place any obligations on Independent Telephone Companies other than GTE. Thus far, the only other Independent Telephone Companies to implement presubscription are United Telecommunications and Southern New England Telephone Co.[132] We request information about the plans of other Independent Telephone Companies to implement payphone presubscription in the future, as well as information regarding the availability to AT&T and the OCCs of billing validation data for calling cards issued by many of the large independent telephone companies. Finally, we seek comment on the importance of these issues, and of non-GTE Independent Telephone Company dial "0" traffic generally, to competition in interstate operator services.

83. We generally seek comment on whether the recent changes in the payphone marketplace have eliminated barriers to competition sufficiently that we should relax our regulation of AT&T's operator services.[133] If not, we seek comment on what changes need to occur before relaxation is appropriate.[134]

84. Finally, we ask those parties who claim that the 0+ marketplace is not sufficiently competitive to permit further relaxation of our regulation of AT&T's operator services to address whether any undue AT&T advantage in the 0+ market affects the competitiveness of other markets as well. For example, we ask for information and comment on the extent to which 1+ competition is affected by an IXC's share of presubscribed payphone lines. Parties should also address any other impact that the provision of 0+ services may have on competition for other services.

C. *State Responses to Competition in the Intrastate Long-Distance*

Marketplace

85. Virtually all states have recognized the vast changes that have transformed the telecommunications marketplace during the past ten years. Indeed, of the 42 states that include more than one Local Access Transport Area (LATA), our initial review indicates that 37 have implemented some type of regulatory reform for AT&T.[135] Regulatory reform by the states has ranged from virtual total deregulation of the intrastate operations of IXCs to relatively minor changes in traditional rate-of-return regulation. Although each state has a statutory regime distinct from the Communications Act, the widespread policy reforms being undertaken by the states based on the growth of competition in the long-distance marketplace reaffirms our conviction that further examination of possible reform at the federal level is necessary and appropriate.

86. One of the more notable responses to competition in long-distance services has come from Iowa. The Iowa State Commerce Commission last year removed all price and earnings regulation from all AT&T intrastate services except operator-assisted MTS. In addition, Iowa permitted AT&T to offer its services pursuant to contracts with individual customers, and without filing tariffs. In concluding that AT&T's intrastate operations should be deregulated, Iowa drew heavily on supply and demand elasticities in the long-distance marketplace.[136]

87. Twelve other states -- Illinois, Nebraska, Maryland, Virginia, West Virginia, Idaho, Oregon, Washington, Minnesota, South Dakota, Oklahoma, and North Dakota -- have substantially deregulated AT&T's provision of intrastate long-distance services. For example, the Illinois Commerce Commission has classified AT&T's MTS, WATS, 800, and private line services as "competitive."[137] Pursuant to this classification, AT&T is accorded price and earnings flexibility for these services, and is permitted to file rate decreases on one day's notice.[138] In addition, AT&T is permitted to offer these services under contract, rather than tariff, provided that it files each such contract under proprietary cover within ten days after conclusion of the agreement.

88. The other states mentioned above have likewise relaxed their regulation of AT&T's earnings and granted it virtually complete pricing flexibility for all or substantially all its services. In addition, each of them has reduced the amount of advance notice required for AT&T tariff filings. Indeed, Oregon and North Dakota permit tariff filings to become effective without advance notice. Washington, Nebraska, and Idaho permit tariffs to become effective on 10 days' notice; Maryland and West Virginia on 14 days' notice. Virginia requires no advance notice for rate decreases and 14 days' advance notice for rate increases. In addition, most of these states no longer require AT&T to submit cost support with its tariffs, and the three that still require some cost support -- Minnesota, South Dakota, and Oklahoma -- have reduced the amount of support that AT&T must provide.[139]

89. Significant regulatory reform also has been implemented in Missouri, Colorado, Alabama, Montana, Texas, and Indiana, which allow AT&T full pricing flexibility for all services except MTS (and, in Texas, operator services). Moreover, each of these states allows AT&T some price flexibility even for MTS. For example, Missouri, Colorado and Alabama give AT&T full downward pricing flexibility for MTS, while Texas and Indiana allow AT&T to price MTS anywhere within a specified floor and ceiling.

90. Missouri is an example of a state that has partially deregulated AT&T as part of a phase-in to total deregulation. In 1987, the Missouri legislature enacted a revised regulatory framework for telecommunictions providers. This law established three categories of carriers -- competitive, transitionally competitive, and noncompetitive -- and prescribed different levels of regulatory scrutiny for each. Pursuant to this legislation, the Missouri State Commission has classified AT&T as transitionally competitive and divided its services into two categories: those deemed transitionally competitive, including MTS, and those deemed competitive, including WATS, 800 service, private line services, and Software Defined Network (SDN) service.[140] As a transitionally competitive company, AT&T is not subject to rate-base earnings regulation, is permitted downward pricing flexibility for transitionally competitive services[141] and full pricing flexibility for competitive and new services. Moreover, after four years in the transitionally competitive category, AT&T will be automatically reclassified as competitive unless the Missouri Commission finds to the contrary.

91. New York also has adopted interim regulatory reform in express contemplation of near-term deregulation of the long-distance service market in that state. New York recently found that AT&T has substantial, though steadily declining, market power in the intrastate interLATA market and should, therefore, be subject to stricter regulation than OCCs. New York concluded, however, that pricing flexibility, especially for AT&T's more competitive services, is appropriate. New York therefore approved implementation of a transitional form of regulatory treatment for AT&T for a period of two and one-half years beginning July 1, 1989 and ending January 1, 1992, and concluded that, unless there is a material change in circumstances, AT&T should be deregulated by the end of the transition plan.

92. In addition to the states mentioned above, thirteen other states permit AT&T at least partial pricing flexibility for all of its services. For example, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Arizona, Montana,[142] and Nevada allow AT&T full downward pricing flexibility. Pennsylvania and Kansas permit price flexibility subject to floors and ceilings for all AT&T services, and Texas and New Jersey permit full downward flexibility for some services, while imposing floors and ceilings for others.[143] Moreover, like the other states mentioned above that have adopted reformed regulation for AT&T, each of these states has reduced the amount of supporting materials that must accompany tariff filings within prescribed price limits. Indeed, Pennsylvania, Montana, Arizona, North Carolina, and Louisiana require no cost support at all if tariff changes are within the prescribed limits. Georgia and Mississippi require only that cost materials demonstrate that prices are above incremental costs.

93. All of the above states have also reduced the amount of notice required for tariff filings. Indeed, four of these states -- Louisiana, Mississippi, Montana, and Nevada -- permit tariffs within prescribed pricing limits to go into effect on ten days' notice or less. Arizona and Kansas allow price changes on fourteen days' notice.

IV. ADAPTIVE REGULATION OF AT & T IN LIGHT OF THE GROWTH OF COMPETITION

94. Based on the analysis set forth above, and, in particular, our tentative conclusion that most services in the interstate long-distance marketplace are subject to vigorous competition, we tentatively conclude that maintaining the full scope of our current regulation of AT&T's provision of interstate, long-distance services is unnecessary and contrary to the public interest. We therefore propose a package of phased regulatory reforms responsive to the changes in the interstate long-distance marketplace.

95. Our package of proposed reforms contains four separate parts. First, we propose initially to modify our regulation of certain business services that appear to be the most vigorously competitive. Specifically, we propose to undertake steps to streamline further our regulation of AT&T's provision of services that are not included in the Residential and Small Business or 800 Service Baskets under price cap regulation. We also propose to permit customer-specific offerings in certain circumstances, and seek comment on two specific proposals for such offerings. Second, we propose to establish transitions to maximum streamlined regulation for services for which some constraints still appear to preclude more unfettered competition, including AT&T's services in the 800 Services Basket, its international MTS, and its operator services. Third, we propose to retain price cap regulation for MTS and ReachOut America, which are now in the Residential and Small Business Basket. Fourth, we tentatively conclude that we should revisit the costs and benefits of several other parts of our current regulatory framework for AT&T and that certain portions of this regulation should be eliminated.

A. *Regulation of AT & T's Business Services*

96. As discussed above, competition among IXCs is particularly visible and intense for business services. We tentatively conclude, based on currently available information, that competition in the provision of business services is sufficiently vigorous that it is appropriate to rely more heavily on the marketplace and less heavily on prior regulatory scrutiny in order to fulfill our statutory mandate with respect to these services.

97. The Commission has long recognized that in effectively competitive markets, market forces can best further the goals of the Act of efficient telecommunications services provided through adequate facilities at reasonable prices. The reason is quite simple: competitive forces best allocate society's resources, encourage innovation and efficiencies, and generally maximize benefits to consumers. Indeed, while limited government regulation of functionally competitive markets may sometimes be appropriate to further important social goals, such as universal telephone service, unduly strict regulation of rates in competitive markets is generally not only superfluous, but harmful to the public interest.

98. We are concerned that our current tariffing regulations for AT&T's business services, which are the subject of vigorous competition, are harmful to consumers. Indeed, the tariff review process may be functioning not so much as a safeguard against unreasonable rates, but as a means by which firms may insulate themselves from competitive market pressures. Thus, instead of protecting the public, our tariffing requirements may unnecessarily be denying or delaying the consumer benefits of rate decreases and new service offerings.

99. We are also concerned that our current tariffing requirements impose an undue competitive disadvantage on AT&T. While asymmetric regulatory requirements were clearly warranted in the past, given the relative market power of AT&T and its competitors, the current asymmetries no longer appear to be justified. Indeed, given the level of competition that we now see in the high-end market in particular, it makes little sense to withhold from AT&T the basic weapon its competitors have to wage their competitive battles: the ability to lower prices quickly to meet or beat the competition. Although we are not today proposing to place AT&T on precisely the same footing as its competitors, the streamlining proposal that we present would significantly reduce disparities in the way we regulate AT&T and its competitors, and to this extent makes our regulatory framework a fairer one, and one that we believe would better serve consumers.

100. We believe that the proposals we set forth herein should not result in higher rates for residential and small business services, or otherwise disadvantage consumers that do not purchase high-end business services. First, we have noted that competition is substantial and nearly ubiquitous even for residential and small business services. Thus, even in the absence of regulatory constraints,

AT&T should not be able to raise prices for residential and small business services without losing significant numbers of customers to its competitors. Moreover, we have tentatively concluded that consumers in those few areas not served by an OCC are protected by the threat of competitive entry, along with AT&T's geographically averaged rates. Nothing we propose should affect those protections. Second, we are not proposing to alter our regulation of AT&T's MTS or ReachOut America services used by residential consumers and small businesses. Continued price cap regulation will serve as a regulatory backstop to competition in preventing AT&T from raising its rates for services in the Residential and Small Business Services Basket in order to cross-subsidize rate decreases for other business services. More broadly, continued price cap regulation will help ensure that AT&T charges just and reasonable rates for these services.[144] Thus, we tentatively conclude that residential and small business customers of AT&T will continue to be protected with the implementation of the reforms proposed herein.

101. We also believe that our proposals would not create any undue risk of anticompetitive conduct by AT&T or by AT&T and its principal competitors. While we do not entirely rule out the possibility of predatory pricing, we believe that existing industry conditions are such that AT&T cannot reasonably hope to benefit from predatory pricing designed to eliminate competition. Nor would it appear likely that AT&T and its largest competitors could coordinate their operations in order to maintain prices above fully competitive levels. Such tacit collusion appears particularly unlikely in the case of business services for which we are proposing regulatory reform.

102. Predatory pricing is generally defined as pricing below marginal cost in order to gain or protect a monopoly position.[145] Pricing particular goods or services below marginal cost is rational only if the predator believes that it will be able to recoup its short-term losses with future monopoly profits. In particular, the predator must be reasonably sure that it will be able to drive existing competitors from the market. Moreover, the predator must also be reasonably sure new competitors will not replace the old ones once it raises its prices to monopoly levels in order to recoup its prior losses. Finally, the predator must be confident that it can achieve its goals without detection, particularly since federal antitrust laws make available treble damages to the victims of predatory pricing. In light of the difficulties of sustaining a predatory pricing scheme, the United States Supreme Court has observed that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.[146]

103. We tentatively conclude that it is unlikely that AT&T would or could successfully engage in predatory pricing if we adopt our proposed regulatory reforms. First, it does not appear that AT&T could drive its principal competitors from the marketplace or that it would expect to be able to do so. A number of OCCs have built substantial and sophisticated telecommunications networks that enable them to provide service to a large number of customers on a highly efficient basis. Thus, AT&T likely would have to sustain significant losses over long periods of time if it were to attempt to drive its competitors from the marketplace. Moreover, any efforts by AT&T to eliminate competition through predatory pricing would be constrained by the presence of resellers in the marketplace and our policy prohibiting resale restrictions.

104. Second, we do not believe that AT&T could effect a predatory pricing scheme without detection. As discussed above, any predation scheme attempted by AT&T likely would require significant price cuts and losses over a substantial period of time. Such sustained price cuts would likely be brought to our attention or to the attention of the courts. Moreover, although our streamlining proposal would reduce our *ex ante* review of AT&T's rates, the rates for all services to which streamlined regulation was applied would remain on file and subject to our *ex post* review and to our complaint processes. Clearly, AT&T would be well aware of the risk, not only of treble damages, but of substantial re-regulation, in the event it was caught attempting to effect a predatory pricing scheme. We believe that these risks would deter such a scheme, even in the unlikely event that AT&T thought that, undetected, it could succeed in a predatory pricing strategy.

105. Finally, we do not believe that AT&T could expect to recoup the losses from sustained below-cost pricing, even if it thought that it could eventually drive its existing competitors from the market. As discussed above, many of AT&T's competitors have recently constructed nationwide, technologically sophisticated transmission networks. Even if AT&T could drive these competitors from the marketplace, the assets of the exiting firms would be available to potential new entrants, quite possibly at bargain prices. Thus, AT&T would face the prospect of new competitors operating at lower costs than its former competitors. Finally, even if AT&T did succeed in remonopolizing the telephone market, its ability to recoup former losses would, no doubt, be eliminated through the rapid re-imposition of regulatory requirements that are inappropriate for competitive markets, but appropriate and necessary for monopoly markets.[147]

106. It is also unlikely that our proposals would enable AT&T and its largest competitors together to engage in anticompetitive activity that results in supracompetitive prices (*i.e.*, prices higher than normally found in a fully competitive market). In particular, we believe for a number of reasons that tacit collusion in the pricing of interstate business services is unlikely.[148] Indeed, we believe that our proposals would be likely to reduce, rather than increase, whatever risk there is of tacit collusion in this marketplace.

107. At the outset, we note that tacit consensus often is difficult to achieve because the companies involved have differing ideas concerning the appropriate price and market share for each member of the group. The intense rivalry that has developed the past few years in business services strongly indicates that IXCs have significantly different perspectives on the future makeup of the interstate interexchange marketplace. In addition, there are a relatively large number of heterogeneous business services that can be combined in a variety of ways to satisfy customers' communications needs. Indeed, large business customers increasingly are seeking customized service packages tailored to their individual requirements. This heterogeneity of business service offerings and the ability of IXCs, including IXCs other than AT&T, MCI, and Sprint, to create new offerings by combining services in new ways would complicate efforts to arrive at tacit consensus on prices for business services.

108. It also appears unlikely that any tacit consensus on rate levels would withstand competitive pressures since individual firms would have strong incentives to undercut such a consensus. Large business users often represent substantial revenues to an IXC, and frequently seek or are willing to agree to long-term service commitments. Thus, IXCs have strong incentives to cut prices if that will enable them to win a long-term commitment from a large business customer. These incentives are heightened by the high percentage of fixed costs relative to marginal costs in the IXC industry. They are further heightened by our *Competitive Carrier* policies, which permit AT&T's competitors to lower prices for business services without advance warning to their competitors.[149] The proposals in this *Notice* would further decrease the risk of tacit collusion in this marketplace by permitting AT&T greater freedom to lower business service prices with little or no advance warning to its competitors.[150]

109. Thus, we tentatively conclude that it is unlikely that there will be tacit collusion in the pricing of interstate business services or that our proposals would enable AT&T and its largest competitors to engage in anticompetitive activity resulting in supracompetitive prices. We seek comment on these tentative conclusions, and on the effect of our proposals on IXC pricing practices.

1. ***Maximum Streamlined Regulation of AT & T's Business Services***

a. ***Services in the Business Services Basket***

110. As discussed above, we tentatively find that AT&T's interstate business services other than its 800 services are subject to vigorous competition. This vigorous competition protects consumers sufficiently to make our current form of regulation superfluous, indeed counterproductive. We therefore propose to further streamline our regulation of AT&T's services in the Business Services Basket.[151]

111. AT&T's services in the Business Services Basket currently are subject to a number of constraints. AT&T's ability to raise prices is limited by the price cap ceiling for the basket and by the 5% upper band on price changes for individual service categories. Any rate increases above those limits require 90 days' prior notice and substantial cost-based showings. Any rate reductions for consumers below the 5% lower band on price changes for individual service categories require at least 45 days' prior notice and a cost-based showing. Rate changes complying with all price cap rules, which are entitled to a strong presumption against suspension, require 14 days' prior notice.

112. These requirements permit detailed regulatory scrutiny and action before a proposed tariff becomes effective, including possible five-month suspension or rejection.[152] Such scrutiny is necessary where competition is not very intense and where prevailing market and regulatory structures raise serious concerns about the possibility of predatory pricing or other violations of the Act.

113. Yet, as discussed above, competition in the provision of business services appears to be quite vigorous. Indeed, AT&T's prices for services in the business service basket are significantly below their price cap, and none of the service category price indexes even approaches the 5% upper band. We believe that this evidence of vigorous competition is sufficient to support a tentative conclusion that market forces should prevent AT&T from attempting to breach these constraints, even with reduced regulation. If AT&T attempts to charge unreasonably high rates, its customers will simply take service from a competitor.[153] Predatorily low rate filings are also unlikely because we do not believe that AT&T could reasonably expect to be able to eliminate competition and recoup its losses, and because price cap regulation, along with competition in the provision of all AT&T interstate services, greatly limits the ability of AT&T to cross-subsidize price cuts in business services through price increases for services in the other two baskets.[154] As a result, we believe that tariff filings in the business services basket warranting suspension or immediate rejection should be rare.

114. We also tentatively conclude that our current regulation of AT&T's business services imposes undue costs, given the current level of competition. Current notice requirements permit AT&T's competitors not only to try to inhibit and delay AT&T actions through the regulatory process, but also to counter AT&T's actions before they become effective.[155] In particular, the current requirements for new services force AT&T to announce new service offerings and rate plans well in advance of their effective dates. This allows AT&T's competitors time to begin, and possibly complete, development and implementation of a market response before AT&T is able to make its offerings available to customers. Current requirements delay the benefits that customers receive from these initiatives by AT&T, and discourage AT&T from undertaking such welfare-enhancing, pro-competitive actions. The current requirements also may tend to reduce competitive incentives for other interexchange carriers to take pro-consumer actions because they can rely on having advance notice of any new services or rate plans AT&T might propose. Absent this advantage, the other interexchange carriers might have greater incentives to develop rate and service initiatives, all to the ultimate benefit of consumers.

115. Moreover, handicapping AT&T vis-a-vis its competitors may reduce the benefits that consumers can obtain from widespread competition in the marketplace -- *i.e.*, AT&T's competitors need not perform as well in order to succeed. Unnecessarily burdening AT&T may not only deny consumers the full benefits that AT&T could bring to the marketplace, but also better services and prices from the OCCs. Thus, instead of protecting the public, some of our tariffing requirements may only be delaying or preventing consumers from realizing the benefits of rate decreases and new service offerings.

116. We therefore propose to apply maximum streamlined regulation to AT&T's services in the business services basket. We would eliminate for that basket both the price cap ceiling and the upper and lower rate bands for individual service categories, which together determine which rate changes are entitled to streamlined review. We would continue to require AT&T to provide these services pursuant to tariff, but would permit changes in the rates and other tariff provisions effective on one day's public notice. Abolition of the price cap ceiling would permit elimination of the regulatory limits placed on the restructuring of domestic business services. Thus, we would propose to include filings for restructured business services in this proposal, allowing such tariff filings to take effect on one day's notice. We also propose to treat tariff filings for new business services within our propos-

al.[156] Finally, we propose to apply maximum streamlined regulation to AT&T's Tariff 12 services, ACCUNET packet switched service, Skynet KU, and all its other services outside of price cap regulation, except for non-IMTS international service, which is already subject to streamlined regulation.

117. We tentatively conclude that, given the current state of competition in the provision of business services, this proposal of maximum streamlined regulation promises greater benefit for the public interest than does our current regulatory regime. Some of our current rules appear to seriously constrain AT&T's ability to respond rapidly in the dynamic business service marketplace. These procedures can be exploited by firms that seek to insulate themselves from competitive market pressures. The more retrospective form of regulation embodied in our proposal would appear to encourage greater competition in interstate business rates and innovation by both AT&T and its competitors. Whenever competition is intense, competition for customers should occur in the marketplace, not the regulatory process, to ensure that the full benefits of competition are made available to consumers.

118. We emphasize that these changes do not represent an abandonment of this Commission's responsibilities. The Commission is fully empowered under sections 4(i), 205, and 403 and other sections of the Act to initiate investigations after a tariff becomes effective and to order any necessary prospective relief. In addition, the section 208 complaint process allows for a determination of lawfulness and full retroactive compensation for any harm due to violations of the Act.

119. We also tentatively conclude that we have ample legal authority to implement this proposal. The Communications Act specifically grants the Commission authority, "for good cause shown," to "modify" the notice period for tariff filings "either in particular instances or by general order applicable to special circumstances or conditions,"[157] although we may not require more than 90 days' public notice. Adoption of a one day notice period for certain services in light of fundamental changes in the interexchange marketplace appears to come within the scope of this language.[158]

120. We therefore ask for comment on our proposal to apply maximum streamlined regulation to AT&T's business services and to establish a one-day notice period for tariff filings for such services. In particular, we seek comment concerning our tentative conclusions about the benefits and drawbacks of the current tariff filing notice periods applicable to these services, and our legal authority to adopt such a proposal. In light of the importance in our analysis of vigorous competition in the provision of these services, we also ask interested parties to discuss whether particular business service categories are not subject to sufficient competition to justify maximum streamlined regulation and thus should remain subject to current regulatory restraints[159] or to longer notice periods.

b. ***Services in the 800 Services Basket***

121. As discussed above, based on information currently available, we believe that competition in the provision of 800 services is in many ways similar to that for other business services, but that the unavailability of 800 number portability currently represents a remaining barrier to full-fledged competition in the provision of 800 services. 800-number portability will become available once the LECs implement a database system for 800 service access currently under development.[160] Last year the Commission determined that the benefits of 800-number portability were outweighed by the increase in post-dial delays that would be caused by implementation of the database access system with the current LEC networks. It noted, however, that more widespread deployment of SS7 signaling by the LECs likely would permit number portability in the future.[161]

122. We tentatively conclude that maximum streamlined regulation, as described above for other AT&T business services, should be extended to AT&T's 800 services if and when 800 numbers become portable. We believe that, at least by such time, any remaining barriers to effective competition in the 800 services market will have been eliminated. We ask for comment on this tentative conclusion, and on whether rapid growth in 800 service volumes or other changes in the 800 service marketplace may diminish sufficiently the importance of 800-number portability so as to permit earlier application of maximum streamlined regulation. We also ask for comment on whether the current significant level of competition in 800 services warrants an interim regulatory approach to services in the 800 Services Basket, and, if so, how such an approach should be effected.

2. ***Single - Customer Offerings***

123. Our proposal for further streamlining Title II regulation of AT&T's services in its Business Services Basket does not appear to be sufficient in itself to adapt our regulatory regime to the dynamics of expanding competition in the interstate long-distance marketplace. As discussed in great detail above, large business customers appear increasingly to procure telecommunications in the same way that they procure other factors of production for which there are significantly competitive markets -- through requests for proposals, sealed bid procedures, and other contracting methods. Such customers often decide that these methods are necessary to obtain the best package of telecommunications products and services at the best price possible. This is particularly true for large businesses competing actively in the increasingly globalized and increasingly information-based world economy.

124. IXCs have actively responded to this recent trend towards using traditional contract methods to procure telecommunications products and services. OCCs, especially MCI and Sprint, have apparently been making a significant number of off-tariff single-customer offerings. MCI and Sprint maintain that this practice is sanctioned by our regulatory doctrine of forbearance, under which they need not tariff their interstate telecommunications service offerings. Likewise, AT&T, through its Tariff 12 offerings, has begun to respond to customer needs for customized services, and, through its Tariff 15 offerings, has sought to respond on the basis of "competitive necessity" to customer-specific discounted offerings of its competitors. Tariff 12 offerings, however, are limited to integrated service packages, must be made generally available, and currently often undergo lengthy tariff review before they become effective. The lawfulness of AT&T's Tariff 15 offerings is subject to dispute.[162]

125. Numerous legal and policy issues remain unanswered regarding this natural evolution of competition in the provision of interstate long-distance telecommunications services. Questions have been raised regarding

whether the OCCs can lawfully make customer-specific offerings under the Communications Act. Also unresolved are the issues of AT&T's authority to respond to customer-specific OCC offers with single-customer offerings under the doctrine of competitive necessity and of the wisdom of allowing AT&T to engage in this competition only in response to, and to the extent of matching, offers by competitors.

126. We here tentatively conclude that we should and can provide AT&T with greater flexibility to respond to the current dynamics of the marketplace. It appears that the current treatment of AT&T and the OCCs with respect to customer-specific offerings affirmatively harms the ability of customers to obtain the best possible interstate long-distance telecommunications service at the best possible prices. We set forth below and seek comment on two proposals for increasing AT&T's flexibility. Either could be adopted in conjunction with our proposal for maximum streamlined regulation of AT&T's business services, or separately. The first proposal would permit AT&T to provide services to end-users on a contractual basis, provided that it files its carrier-customer contracts with the Commission within 30 days of the effective date of each contract. The second proposal would permit AT&T to provide a limited amount of service on a private carriage basis, provided that it receives approval of a § 214 application withdrawing a portion of its facilities from common carriage. We also invite comment on alternative approaches to customer-specific offerings, such as the competitive necessity doctrine or permitting customer-specific tariffs subject to maximum streamlined review, that would further the public interest and reduce regulatory asymmetries. We request comment on our legal authority to adopt our proposals or any alternative proposals that are offered.

a. *Contract Rates*

1. *The Proposal*

127. One proposal granting AT&T greater flexibility to make single-customer offerings is to permit all IXCs, including AT&T, to contract with customers for the provision of certain services. Under this proposal, AT&T would be required to file with the Commission its single-customer contracts within thirty days of the effective date of the contract. All IXC contracts would remain subject to the bar against unreasonable discrimination contained in the Act.[163] The Commission would make available to the general public contract summaries prepared by AT&T; more specific contract information would be available only subject to protective orders designed to protect confidential commercial information.

128. Permitting IXCs to offer large business users the option of obtaining services under contract would seemingly offer significant benefits without appreciable costs. First, permitting telecommunications contracts would enable users to purchase services that match their needs in specific ways. Second, contracts might also enable users to share with their carrier savings that flow from the greater flexibilities that private contracting offers to IXCs in designing communications services. Third, contracts could facilitate planning by users and IXCs alike through the greater availability of long-term commitments and price protection. Long-term commitments would benefit carriers in their network planning and their allocation of network resources, and users, who may prefer long-term rate commitments to the uncertainties of the tariff process. Fourth, contracts would permit the realization of economic efficiencies. To the extent that carriers are able to share with individual customers efficiencies that accrue from particular customer commitments, carriers can encourage the more efficient use of their facilities. In addition, permitting carriers to offer discounts to win business that they might otherwise lose to a competitor will result in lower prices for consumers. Finally, if we do not require general public disclosure of contract rates, permitting IXCs to offer services on a contract basis would minimize the risk of anticompetitive pricing through collusion.

129. Nor do there seem to be significant risks that contracts could become a vehicle for predatory pricing or that residential and small business customers would be required to subsidize lower contract rates to large business customers with higher rates of their own. As discussed above, predatory pricing is likely to occur only if a carrier can eliminate competition and deter potential competitors from entering the marketplace. Otherwise, the short-term losses incurred as a result of the predatory prices cannot be recouped through subsequent monopoly profits. Predatory pricing also is likely to occur only if it is unlikely to be detected, given the availability of treble damages to the victims of predatory pricing. We do not believe that any IXC, including AT&T, has the ability to eliminate competition through predatory pricing, nor do we believe that predatory pricing could occur without detection. In addition, the proposed requirement that AT&T's contracts be filed provides further assurances that adoption of this proposal would not result in undetected predatory pricing.

130. Similarly, we do not believe that residential or small business customers would be harmed by permitting AT&T to provide contract rates. First, we have noted that there is substantial competition among IXCs for all customers, including residential and small business customers. Therefore, if AT&T sought to raise its MTS rates, other IXCs would be ready, willing, and able to accommodate disaffected residential or small business customers. Second, we are proposing to retain price cap regulation of MTS and ReachOut America services targeted by AT&T to residential and small business consumers, and (at least for an interim period) of IMTS and operator services, which are also heavily used by these consumers. The price caps would prevent AT&T from cross-subsidizing any discounts in contract rates by raising its rates for these capped services above the presumptively just and reasonable rates for these services.

2. *Lawfulness of Contract Rates*

131. Notwithstanding the apparent benefits of contract carriage, there is some question as to whether the Act permits common carriers to provide telecommunications services on a contractual basis. The primary legal issues are whether the Act precludes carrier-customer contracts and whether private carrier-customer contracts are reconcilable with the "nondiscrimination" requirement of Section 202(a) of the Act, which makes it unlawful for any carrier to discriminate unreasonably or unjustly in charges for like communications services.[164] The courts have never directly addressed these issues.[165] Based on the provisions of the Act, as well as precedent under the Interstate Commerce Act and the Natural Gas Act, we tentatively conclude that the Act permits us to authorize

IXCs to provide certain services on a contract basis, provided that these contracts are made available under substantially similar circumstances to similarly situated customers.

132. The Interstate Commerce Act and the Natural Gas Act both contain nondiscrimination requirements analogous to §202(a) of the Act.[166] Notwithstanding these provisions, both the Interstate Commerce Commission (ICC) and the Federal Energy Regulatory Commission (FERC) have expressly permitted carriers subject to their jurisdiction to provide service on a contractual basis. Moreover, both agencies have been upheld on appeal.

133. The ICC announced that it would recognize contracts between railroads and shippers in a policy statement issued in November, 1978.[167] Finding that contracts between railroads and shippers would facilitate planning by both rail carriers and shippers, reduce shipping costs, and permit the more efficient provision of rail service, the ICC stated that contract rates would not be considered *per se* unreasonable, and, indeed, would henceforth be encouraged.[168] The ICC required rail carriers to file their contracts and stated that it would review these contracts on a case-by-case basis, taking into account all relevant factors.

134. In two subsequent policy statements, the ICC elaborated on its policy favoring contract rates. In 1979, it rejected a claim that contract rates were inherently discriminatory, noting that "differences in a railroad's cost of serving individual shippers can justify different rates," as well as "differences in competitive circumstances, as where lower rates are offered to one shipper to meet carrier competition which is not present for the traffic of another shipper.[169] In 1980, it announced that any rate included in a contract executed after the 1978 Policy Statement would be considered presumptively lawful and would be invalidated only upon a showing of unusual and compelling circumstances indicating that enforcement of the rate would be detrimental to the public interest.[170]

135. On appeal, the United States Court of Appeals for the District of Columbia upheld the ICC policy. With respect to claims that individually negotiated contract rates violated nondiscrimination provisions of the ICA, the court affirmed the ICC's reasoning, stating:

> Although one normally regards contract relations as highly individualized, contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms. If those terms result in lower costs or respond to *unique costs* or respond to *unique competitive conditions*, then shippers who agree to enter into the contract are not similarly situated with other shippers who are unwilling to do so. Under these circumstances, a carrier may properly charge contract rates for contract and noncontract carriage without running afoul of the prohibition on discriminatory pricing.[171]

136. FERC authorized contract pricing in 1985 through its so-called "selective discounting" policy.[172] Under selective discounting, pipelines are permitted to charge individual customers any rate within a range specified in their tariffs. The ceiling rate is based on fully distributed costs; the floor rate is based on average variable costs. If the pipeline charges any customer a rate below the ceiling, it must within 15 days of the close of the first billing period, report the maximum rate for the transaction, the rate actually charged, the shipper's identity, and any corporate affiliation between itself and the shipper.

137. In adopting selective discounting, FERC, like the ICC, specifically concluded that contract rates were not necessarily at odds with statutory provisions prohibiting undue discrimination. FERC stated that a difference in rates charged two customers represents "undue discrimination" only if the difference is among similarly situated customers and is not justified by differences in the costs of providing the service or by some other legitimate factor. Moreover, citing *SeaLand*, FERC suggested that one "legitimate factor" that would justify disparate contract rate would be the need to discount prices in order to "make a sale that would not otherwise be made."[173]

138. FERC's selective discounting policy also has been upheld by the United States Court of Appeals for the District of Columbia Circuit.[174] Although the court based its decision, in part, on Congress's expressed "intention in the NGA to allow a vital role for private contracting,"[175] the Court rejected arguments that selective discounting, and, in particular, rate differentials based on competitive conditions, necessarily constitute undue discrimination.[176]

139. Based on the precedent established by the ICC and FERC policies, as well as the court decisions upholding these policies, we tentatively conclude that our contract rate proposal is fully consistent with the requirements of the Communications Act. We tentatively conclude, first, that the absence of an explicit statutory authorization for carrier-customer contracts is no bar to such contracts. In 1978, when the ICC issued its Policy Statement favoring carrier-customer contracts, the ICA contained no reference whatsoever to carrier-customer contracts.[177] Yet the ICC found the ICA to be sufficiently flexible to allow these contracts, and the courts have upheld the ICC's Contract Rates Policy. Indeed, the Communications Act, unlike the pre-Staggers-Act ICA, does contain language within which carrier-customer contracts would fall. Thus, section 211(a) requires carriers to file copies of all contracts they have with other carriers, while section 211(b) authorizes the Commission to require the filing of "any *other* contracts of any carrier."[178] Similarly, section 219(a) authorizes the Commission to require carriers to file annual reports containing, *inter alia*, "information in relation to charges or regulations concerning charges, *or agreements, arrangements, or contracts affecting the same*."[179] Thus, we do not believe that the Act precludes the use of carrier-customer contracts.

140. We tentatively conclude, second, that carrier-customer contracts are not necessarily inconsistent with the nondiscrimination provisions of the Communications Act. Those requirements parallel the nondiscrimination provisions contained in both the ICA and the NGA.[180] Thus, the permissibility of contract rates under both those nondiscrimination provisions provides strong support for our conclusions that contract rates can comply with the requirements of the Communications Act. Indeed, the fact that the NGA expressly contemplates carrier-customer contracts while simultaneously precluding unreasonable discrimination (with language analogous to §202 of the Communications Act) may itself be evidence that carrier-customer contracts are not *per se* unreasonably discriminatory.

141. We therefore tentatively conclude that we may authorize IXCs to offer service to individual customers on a contract basis provided that similar terms are made available to other customers under substantially similar circumstances and conditions. In addition, pursuant to §211(b), we would require AT&T to file with the Commission each of its carrier-customer contracts, within 30 days of its effective date, along with a contract summary. We propose to make AT&T's prepared summaries of its contracts available for public inspection. We propose, further, to provide more detailed information subject to the conditions of protective orders.[181] We seek comment on whether these filing requirements are the most appropriate means of enforcing our nondiscrimination criteria. In this regard, we seek comment on the necessity of adopting such procedures for the disclosure of information, given the independent review the Commission will conduct and the serious potential that widespread public disclosure will undermine vigorous competition in the provision of contract services. We also seek comment on what information must be available to the general public, what information must be available subject to a protective order, and what protections should be required in protective orders.[182] Finally, we seek comment on our tentative legal conclusions, as well as, more broadly, on the public policy merits of this proposal.

b. *Private Carriage*

1. *The Proposal*

142. Our other proposal for granting AT&T more flexibility to respond to the market-based trend towards single-customer offerings would be to permit IXCs to provide a limited amount of service on a private carriage basis.[183] Under this proposal, private carriage arrangements could be offered only after the carrier received § 214 authority to withdraw either specific facilities or a portion of its facilities from common carriage.[184] In the latter case, the percentage of facilities withdrawn would be based on the percentage of the carrier's traffic that it proposed to service via private carriage arrangements. We would grant § 214 applications only upon a showing that the withdrawal will not have a significant detrimental effect upon common carrier service -- *i.e.*, that needed common carrier service will remain available --and that common carrier services will not subsidize private offerings.

143. Because private carriage would be conducted pursuant to individually negotiated contracts, private carriage would offer many of the same benefits and efficiencies of our contract carriage proposal. In addition, private carriage would offer certain advantages over contract carriage. For instance, private carriage would minimize the potential for pricing above competitive levels in the marketplace or other restrictions on competition. One of the basic prerequisites for such anticompetitive behavior is knowledge of a competitor's prices. If a carrier lacks knowledge of its competitors' prices, it cannot be sure that any formal or informal agreement to set prices will be honored by its competitors. Consequently, the carrier has little incentive to seek or abide by such agreements or understandings. For similar reasons, private carriage would minimize the risk of tacit collusion, which is greatly facilitated to the extent that rates are disclosed through public filings. Because private carriage rates would not be filed with the Commission, it would be much more difficult for IXCs to engage in tacit collusion.[185]

144. In addition to reducing risks of anticompetitive pricing, the private carriage approach would appear to be most consistent with the thriving competition that prevails in the high-end marketplace. It is axiomatic that market forces can more effectively discipline competitive markets than can government regulation. Although our streamlining and contract proposals would reduce government regulation, AT&T's carrier-customer rates would remain subject to our scrutinty and subject to regulatory challenges under Title II of the Act. By contrast, private carriage would place single-customer offerings voluntarily entered into by carriers and customers outside the purview of Title II. If AT&T had the ability to engage in predatory pricing, removing a portion of its service from Title II regulation might be inappropriate.[186] As discussed above, however, it appears unlikely that AT&T would or could engage in predatory pricing, given the broad scope of competition it faces and our proposed retention of price cap regulation for its services for residential and small business consumers and for its 800 services. Absent a significant risk of predation, Title II regulation of private carriage arrangements may be altogether superfluous.[187]

145. We seek comments on the benefits of private carriage and on the overall merits of this proposal. In addition, we ask for comments on how this private carriage plan, if desirable, could best be implemented. For example, we seek comment on: (1) whether, given continued price cap regulation, any changes would be needed in our current joint cost allocation rules; (2) whether any changes would be necessary in the current levels of our price cap ceilings; (3) what changes would be required in our rules governing the allocation of exogenous cost changes among price cap baskets and private carriage services; (4) what standards should govern the § 214 discontinuance applications, what conditions might attach to the grant of such applications, and whether IXCs should lose eligibility for common carrier microwave radio services upon discontinuance of a common carrier offering; and (5) the extent to which private carriage would or should remain subject to Commission oversight.[188]

2. *Lawfulness of Private Carriage*

146. We also seek comment on whether our private carriage proposal is consistent with the Communications Act. We tentatively conclude that it is.

147. It has long been recognized that telecommunications services may be provided by means other than traditional common carrier offerings. Thus, in 1949, the Commission announced that it would allocate frequencies used for private land mobile radio services to both common carriers and private users.[189] Ten years later, the Commission authorized private microwave networks and began allocating microwave frequencies therefor.[190] More recently, the Commission allocated frequencies for noncommon carrier service in the domestic land mobile radio service. In this latter proceeding, the Commission created a new category of private mobile operators, termed Specialized Mobile Radio Systems (SMRS), to provide service on a commercial, private carriage basis to third parties. Deciding that private carrier status would speed the development of mobile radio technologies, the Commission declined to subject SMRS to common carrier regulation.[191]

148. It is also well-established that communications carriers may operate as common carriers with respect to only a portion of their services. [192] Likewise, it has been recognized that communications carriers may engage in both common carriage and private carriage. Thus, in the *Transponder Sales Order*, [193] the Commission authorized domestic satellite (domsat) licensees providing service on a common carrier basis to make available on a noncommon carrier basis a limited part of their transmission capacity on terms individually negotiated with selected purchasers. This decision was upheld by the United States Court of Appeals for the District of Columbia Circuit. [194]

149. The Commission has significant leeway in determining whether a particular service should be provided on a common or private carriage basis. [195] The touchstone for distinguishing between private and common carriage, according to the D.C. Circuit, is whether the service is of a "quasi-public character," that is, whether the carrier "undertakes to carry for all people indifferently." [196] In the domsat operators case, the Commission applied this test, pointing to "the movement in the industry toward long term relationships" as "evidence that the transponder buyer and seller have very particularized technical and marketing needs" and concluded that "the nature of transponder service is not such that it would be expected to be provided uniformly and indiscriminately to all potential customers on a common carrier basis." [197]

150. On appeal, the court affirmed the Commission's findings. The court held that there was adequate record support for the Commission's determination that satellite operators engaging in transponder sales would not likely "hold themselves out indifferently to serve the user public." [198] In addition, the court rejected claims that the Commission was obligated to fasten on domsat operators an exclusively common carrier regime. [199] The court also found that the Commission's balancing of the public interest considerations involved in authorizing domsat transponder sales was adequately supported.

151. Based on this precedent, we tentatively conclude that we have authority under the Act to permit IXCs to offer a limited quantity of high-end interstate services on a private carriage basis. Many large business customers have developed highly sophisticated and specialized telecommunications needs that cannot be optimally met through generalized tariffed offerings. In response, IXCs have sought to offer individualized telecommunications packages to particular customers. Likewise, IXCs and large customers are increasingly seeking and entering into long-term commitments. These factors, which are similar to the factors relied upon in the *Transponder Sales Order*, indicate that high-end service may well, in some cases, be taking on the characteristics of private carriage.

152. As in the *Transponder Sales Order*, we are now proposing only a limited authorization of private carriage. This limited private carriage option should in no way interfere with the availability of common carrier services. Private carriage would be authorized only upon approval of a § 214 discontinuance application, and as part of our review of such applications, we would specifically address the impact the proposed private service would have on common carrier services and prices.

B. ***Regulation of AT & T's Residential and Small Business Services***

1. ***IMTS Service***

153. Based on our tentative conclusion above that key entry barriers previously inhibiting the development of significant competition in the provision of IMTS have been substantially reduced, we also propose to relax our regulation of AT&T's provision of IMTS at some point in the future. We seek comment on the conditions necessary for subjecting AT&T's IMTS to streamlined regulation, and on the possibility that we undertake such reform as of January 1, 1993. [200]

154. As discussed above, the principal barrier to effective competition in international services has been the need for IXCs other than AT&T to obtain operating agreements with foreign regulatory authorities in order to receive any terminating traffic from foreign countries or to handle originating international traffic with their own facilities. In recent years, both MCI and Sprint have obtained operating agreements for every or virtually every major international market. Thus, it would appear that the structural barriers to IMTS competition among domestic carriers have now been greatly reduced, and that MCI and Sprint, as well as other carriers currently offering IMTS services, have the required authority to compete broadly with AT&T in the provision of IMTS.

155. At the same time, however, it appears that AT&T retains an overwhelming share (approaching 90%) of the IMTS market. In addition, the Commission has long had policy concerns about the possibility that foreign PTT monopolies might "whipsaw" competing U.S. carriers to the benefit of the PTTs and to the detriment of U.S. carriers and ratepayers. [201] We therefore tentatively conclude that we should not immediately relax our current regulation of IMTS. Based on these considerations, we seek comment regarding the circumstances that would justify streamlining our regulation of AT&T's IMTS. We suggest, with the recent reductions in barriers to effective competition in the provision of IMTS, that by January 1, 1993, competition will have increased sufficiently to warrant streamlined regulation of this service. We ask for comment on whether barriers to effective international competition have been removed, whether streamlining should be implemented on a country-specific basis, and whether January 1, 1993 is an appropriate target date for streamlined treatment of IMTS.

2. ***Operator Services***

156. We also propose to apply maximum streamlined regulation to AT&T's provision of interstate operator services, other than 800 directory assistance (DA) service, [202] if and when barriers to vigorous competition in the provision of operator services have been eliminated. As discussed above, implementation of payphone presubscription plans by the BOCs and GTE and of procedures enabling all IXCs to validate BOC and GTE calling cards has greatly reduced barriers to full competition in the provision of operator services. In particular, these developments have substantially enhanced the ability of OCCs to compete for 0+ traffic that originates from payphones. This is significant because roughly half of all dial "0" interLATA calls originate from payphones, and we assume that many callers dial these calls on a 0+ basis. Indeed, since BOC and GTE payphones represent

the vast majority of all payphones, the operator services market may now be sufficiently competitive to warrant an immediate transition to maximum streamlining. On the other hand, further changes may be required before maximum streamlining is appropriate. We therefore seek comment on whether the provision of IXC operator services is now sufficiently competitive to warrant maximum streamlining of our regulation of AT&T's operator services. We ask those parties claiming that maximum streamlined regulation of operator services is still premature to identify any remaining barriers to full and fair competition in the provision of operator services and to provide information and comment on the significance of these barriers, as well as on how these barriers might be removed. [203]

3. *Domestic Residential and Small Business Toll Services*

157. As discussed above, AT&T's provision of domestic residential and small business toll services, currently MTS and ReachOut America, would appear to be subject to significant competition. Approximately 93% of all customer access lines have been converted to equal access, allowing subscribers to select the interexchange carrier of their choice. [204] Although equal access is more widely available in BOC service areas, more than 80% of all independent telephone company access lines have been converted to equal access. [205]

158. Despite the fact that MTS and ReachOut America appear to be competitively provided, we tentatively conclude that we should not consider significant deregulatory measures for these services until we begin the review of AT&T's experience under price caps scheduled for the fourth year of that program. [206] This gradual approach to loosening the regulation of AT&T will allow us to obtain actual experience with reduced regulation for most, if not all, business services before considering application of such measures to residential and small business services. We believe that this approach is warranted in light of the less fully competitive nature of the domestic residential toll market[207] and our desire to proceed with an extra measure of caution in adjusting the regulatory structure for services used by residential and small business customers.

159. We seek comment on our proposal to exclude from the present Notice consideration of changes in the regulatory structure for domestic residential and small business toll services. We also ask interested parties to address our tentative conclusions concerning the extent of competition in the market for domestic residential and small business toll services.

C. *Other Regulatory Policies*

160. We also seek comment on other possible regulatory changes, including modification of certain rules governing AT&T's provision of customer premises equipment (CPE) and enhanced services, and AT&T's bundling of CPE and transmission services. In addition, we reaffirm our commitment to geographic rate averaging and seek comment on whether any changes in our proposals are necessary in light of this commitment. We invite parties to comment on whether other regulations, such as rules governing AT&T's depreciation practices, our §214 requirements for domestic services, or any reporting requirements not discussed herein, should be modified, in whole or in part, in light of increased competition in the interstate interexchange marketplace.

1. *Modification of Restrictions Governing AT & T's Provision of CPE and Enhanced Services*

161. We now seek comment on whether we should revise or remove certain regulatory requirements governing AT&T's provision of CPE and enhanced services. In particular, we ask whether we should modify or eliminate certain of the nonstructural safeguards and the comparably efficient interconnection (CEI) requirements established in the *AT & T Structural Relief Order* [208] and the *Computer III* proceeding. [209] We tentatively conclude that we should eliminate application of some of these requirements to basic network services that are, or become, subject to maximum streamlined regulation. In particular, as discussed more fully below, we propose to phase-out our CEI and nondiscrimination reporting requirements as we phase-in maximum streamlined regulation for AT&T's network services. We also seek comment on whether we should retain, relax, or repeal our network disclosure rules. [210]

162. In the *AT & T Structural Relief* proceeding, [211] the Commission replaced the structural separation requirements established in the *Second Computer Inquiry* [212] to govern AT&T's provision of CPE with a regulatory regime based on nonstructural safeguards. One such safeguard is the requirement that AT&T refrain from discriminating against customers with non-AT&T CPE in its provision of network services. To monitor AT&T's compliance with this safeguard, the Commission required AT&T to file quarterly reports comparing the timeliness with which it provided installation and maintenance of basic services to customers with AT&T CPE and customers with other vendors' CPE. The Commission required AT&T to disaggregate the data in these reports into seven basic service categories, including WATS/800 service, three categories of analog private line service, and three categories of digital private line service. [213] The Commission also required AT&T to submit its installation and maintenance procedures to an annual audit by an independent firm and to file each audit report with the Commission. [214]

163. Another safeguard is the requirement that AT&T disclose information about any network changes or new network services that affect the interconection of CPE with the network. Disclosure requirements are triggered at two points in time. First, at the "make/buy" point -- that is, when AT&T decides to make or procure any product the design of which affects or relies on the network interface -- AT&T must disclose technical network information about the planned network changes or services to any entity that executes an agreement stating that it will not disclose such information to AT&T's network service competitors. Second, twelve months prior to the introduction of the new service or network change that affects CPE interconnection, AT&T must make public disclosure of such information. If AT&T is able to introduce the new service or interface between six and twelve months after the make/buy point, public disclosure is permitted at the make/buy point, but under no circumstances is AT&T permitted to initiate the service or interface less than six months after public disclosure.

164. In the *Computer III* proceeding, the Commission replaced the structural separation requirements for enhanced services with a similar set of nonstructural safeguards. Among the nonstructural safeguards adopted in *Computer III* are essentially the same nondiscrimination reporting and network disclosure requirements governing

AT&T's provision of CPE. In addition, the Commission imposed CEI requirements that preclude AT&T from offering a specific enhanced service, or class of services, on an unseparated basis until it has submitted, and received approval of, a service-specific CEI plan. In each plan, AT&T must demonstrate that it will provide interconnection opportunities to other enhanced service providers (ESPs) on an "equal access" basis. This "equal access" standard applies to CEI parameters concerning: interface functionality; unbundling of basic services; resale; technical characteristics; installation, maintenance, and repair; end-user access; CEI availability; minimization of transmission costs; and recipients of CEI. [215]

165. The nonstructural safeguards adopted in the *AT&T Structural Relief Order* and the *Computer III* proceeding were intended to alleviate concerns that AT&T might, through its provision of network services, gain an undue advantage in the CPE or enhanced services marketplace. These requirements derived from the Commission's assumption at the time that AT&T maintained significant market power in the provision of at least some long-distance services and might be able to leverage this market power in its provision of unregulated services. The Commission so stated in rejecting arguments by AT&T that these requirements were unnecessary. [216] Nevertheless, in 1987, when the Commission reviewed the *Computer III Phase I* requirements on reconsideration, the Commission expressly recognized that AT&T faced "increasing actual and potential competition for most of its service offerings, including those for which it presently retains a degree of market power." The Commission noted that "[c]ompetition in the markets for such services decreases AT&T's ability to act anticompetitively." [217] In addition, the Commission noted that:

> as interexchange and end-to-end basic service competition increases, the competitive market will provide all basic service customers, including enhanced service providers, with alternative sources for such basic services. As such competition develops, AT&T's ability to discriminate should decline, since enhanced service providers whose needs are not met by AT&T will be able to obtain service from its competitors. [218]

In recognition of this increased competition, the Commission decided, on reconsideration, not to apply to AT&T the full panoply of Open Network Architecture requirements that applied to the BOCs.

166. In the three years since the *Phase I Reconsideration*, competition in the interexchange markets has grown considerably. In early 1987, less than three quarters of the nation's access lines had been converted to equal access; now 93% of all lines have been converted. In addition, as discussed above, AT&T's competitors have continued to grow in terms of revenues, assets, the geographic areas they serve, and the number and kinds of services they provide. Competition appears to be most especially intense for business services.

167. Based on these market changes, we tentatively conclude that we should repeal our CEI and nondiscrimination reporting requirements, at least to the extent these requirements apply to services that are, or become, subject to maximum streamlined regulation. [219] We base this tentative conclusion on our belief that increased competition has significantly diminished AT&T's incentive and ability to discriminate against competing CPE vendors or ESPs in its provision of such services. In particular, we believe that, given the broad-based competition faced by AT&T in virtually all market sectors, if AT&T offers inferior quality network services to customers or potential customers, or fails to provide ESPs with satisfactory network arrangements, those customers now have the ability to purchase equivalent network services elsewhere and will do so. Moreover, AT&T's automated procedures for processing installation and maintenance orders provide further assurances that discrimination in the provision of installation and maintenance service will not occur. Indeed, we note that AT&T has been filing quarterly nondiscrimination reports for approximately four years, and these reports have yet to uncover any evidence of discrimination by AT&T in its provision of network services. Nor has any party filed a complaint during this time alleging any such discrimination.

168. At the same time, we note that our CEI and nondiscrimination reporting requirements continue to impose costs on AT&T and on consumers. Our CEI requirements delay the availability of new enhanced services by AT&T. Moreover, by requiring AT&T to provide advance notice to its enhanced service competitors of its planned enhanced services, these requirements may reduce AT&T's incentives to develop new, innovative enhanced services. They also may significantly handicap AT&T in the enhanced services marketplace, which is an extremely competitive marketplace and one in which AT&T has a relatively small presence.

169. Similarly, the current nondiscrimination reporting rules require AT&T to compile quarterly reports detailing its installation and maintenance intervals for seven different services and to retain annually an auditor to monitor its installation and maintenance procedures. These rules impose what we presume are not insubstantial costs on AT&T. Indeed, in a recently filed petition seeking repeal of the audit requirement, AT&T states that it has been billed in excess of $1 million for the first three audits alone and that these audits entail substantial internal expenses and time as well. [220]

170. We therefore propose to modify our CEI and nondiscrimination reporting rules in the following respects. We propose, first, to relieve AT&T of the obligation to obtain advance approval of a CEI plan prior to introducing a new enhanced service if the network components of that enhanced service are services subject to maximum streamlined regulation. To the extent that a new enhanced service uses network services not subject to maximum streamlining, AT&T would remain subject to our CEI requirements.

171. We propose, second, to relieve AT&T of the obligation to file nondiscrimination reports for services subject to maximum streamlining. Currently, AT&T includes 800/WATS service and six private line services in its reports. We have proposed to subject WATS service to maximum streamlining and we have sought comment on whether private line services, as well, should be subject to our proposed regulatory reform. Should we conclude that maximum streamlining should be adopted for WATS and private line service, we tentatively conclude that AT&T should be required to track and file data concerning 800 service only. This requirement would be lifted once maximum streamlining applied to 800 service as well.

172. We propose, third, to eliminate the requirement that AT&T subject its installation and maintenance procedures to an annual outside audit. Although in response to AT&T's petition for Rule Making for elimination of this requirement, parties allege that AT&T's installation procedures do not preclude the possibility of discriminatory circuit assignment by AT&T, as noted above, we tentatively conclude that the market is sufficiently competitive so as to obviate concerns in this area.

173. We note that elimination of nondiscrimination reporting and audit requirements would not relieve AT&T of its obligation pursuant to § 202(a) of the Act to provide service on a nondiscriminatory basis. We affirm that this provision precludes any carrier from deliberately discriminating in its provision, maintenance, or repair of basic network services to favor or disfavor a particular CPE vendor or ESP. If AT&T provides inferior network services to competing ESPs or to their customers or to the customers of competing CPE vendors, aggrieved parties have the right not only to switch to another carrier, but to file a complaint against AT&T. Similarly, if AT&T represents to a potential customer that if it purchases CPE or enhanced services from AT&T it will receive superior or faster provisioning or maintenance of network services, that potential customer or an AT&T competitor can file a complaint against AT&T. Indeed, we doubt that AT&T could make such representations, except perhaps on the most isolated basis, without detection, and we believe that the likelihood of detection further constrains AT&T's ability to engage in improper discrimination.

174. We ask for comment on our tentative conclusions that our CEI and nondiscrimination reporting requirements are no longer necessary and should be modified. We also ask for comment on the modifications proposed herein, including whether these proposals go too far or not far enough in eliminating wasteful and costly regulation.

175. Finally, we ask for comment on whether we should retain, relax, or repeal the special network disclosure requirements placed on AT&T in light of the growth of competition in the provision of long-distance services. We note that wholly apart from these network disclosure requirements, AT&T remains subject to the All Carrier Rule, [221] which requires all carriers to provide information about network changes reasonably in advance of implementation of such changes. Because AT&T appears to face effective rivalry in its provision of long-distance services, particularly business services that are most affected by the network disclosure rule, the All Carrier Rule may adequately protect the interests of AT&T's CPE and enhanced service competitors. Alternatively, the All Carrier Rule, coupled with a partial relaxation of our network disclosure requirements, may adequately address any concerns in this area. We raise these issues because we are concerned that in its current form, the special network disclosure rule applicable to AT&T may unnecessarily delay the availability of new services and impede innovation by requiring the company to wait a minimum of six months after public disclosure before introducing new services. We note, however, that our various network disclosure rules, including both the All Carrier Rule and AT&T's special network disclosure obligations, address concerns that carriers could hinder competition in fields that make use of the basic network by withholding information about that network. Relaxation or repeal of AT&T's special disclosure requirements may be inappropriate if that were to cause undesirable effects in the CPE or enhanced service marketplace. We ask for comment on the costs and benefits of that network disclosure rule and on whether it should be retained, modified, or eliminated altogether. We also seek comment on whether any modifications to the network disclosure rule should be limited in application to services subject to maximum streamlined regulation. [222]

2. ***Rules Governing AT & T's Bundling of Interstate Transmission Services and CPE***

176. In light of our tentative finding that the interstate long-distance marketplace is substantially competitive, especially for services purchased primarily by business users, we seek comment on whether we should modify our rules governing AT&T's bundling of interstate transmission services and customer premises equipment (CPE). In particular, we seek comment on whether we should allow AT&T to bundle CPE with services subject to maximum streamlining and with single-customer offerings. In addition, we seek comment on allowing AT&T to bundle CPE with other services for promotional offerings of limited duration.

177. In the *Computer II* proceeding, the Commission required that all common carriers sell or lease CPE separate and apart from the carrier's regulated services, and that all new CPE be detariffed. [223] By requiring common carriers to offer unbundled CPE and transmission services, the Commission gave customers the ability to design their own CPE and service packages to best meet their individual communications needs. [224] Otherwise, customers might be forced to buy unwanted carrier-supplied CPE in order to obtain necessary transmission services. [225] By detariffing CPE and thus removing all CPE costs from regulated service revenue requirements, the Commission sought to prevent uneconomic pricing. The Commission was concerned that consumers who did not use carrier-provided CPE could find themselves subsidizing consumers who did use carrier-provided equipment, [226] and that independent CPE vendors would be forced to compete against below-cost, state-tariffed CPE because, pursuant to jurisdictional separations, part of CPE costs were recovered through interstate service rates.

178. In light of the substantial competition evident in the interstate long-distance marketplace and the changes in CPE markets that have occurred since 1980, some amendment of the unbundling requirement may be appropriate. The bundling of CPE with services would allow AT&T to compete more vigorously in the long-distance market by creating attractive service/equipment packages for customers. This, in turn, could spur other interexchange carriers to respond by developing innovative packages as well. Such an environment may encourage initiatives by all interexchange carriers to research, identify, and eventually meet the particularized communication needs of their customers. The ultimate beneficiary would, of course, be the consumer.

179. We believe it unlikely that AT&T could engage in anticompetitive behavior with respect to the bundling of CPE with services subject to maximum streamlined regulation. The essential characteristic of an illegal tying or bundling arrangement "lies in the seller's exploitation of its control over [one] product to force the buyer into the purchase of a [second] product that the buyer either did not want at all or might have preferred to purchase elsewhere." [227] Because maximum streamlined regulation

will apply only to services that are subject to vigorous competition, AT&T should not be able to force unwanted CPE on the purchasers of such services. If it attempts to do so, customers will obtain their network services elsewhere. [228] Similarly, AT&T is unlikely to sell its bundled CPE/transmission packages below cost since AT&T cannot expect to drive either its CPE or interexchange competitors from the market and recover the losses by raising prices at a later date. On the other hand, revision of the unbundling requirement would be inappropriate if it would lead to anticompetitive results.

180. The Commission currently permits AT&T to file short-term promotional tariffs for its long-distance service offerings. We seek comment on the public interest of permitting AT&T, in conjunction with such promotional offerings, to bundle CPE with interstate services other than those subject to maximum streamlined regulation or part of a single-customer offering.

3. *Maintenance of Geographically Averaged Rates*

181. We wish to reemphasize the Commission's longstanding commitment to geographic rate averaging.[229] The Commission's recent *Price Caps Order* stated that rate averaging "furthers our goal of providing a universal nationwide telecommunications network," [230] ensures that rural ratepayers share in the benefits of interexchange competition, and contributes to the simplicity of the MTS rate structure, allowing customers to compare the interexchange carriers' charges with relative ease. [231] The Commission stated that any AT&T tariff proposing to deaverage rates would be subject to the full 90-day notice period provided under Section 203 of the Act and would be suspended for the full five-month investigation period provided for under Section 204 of the Act. In addition, the Commission pledged to subject any such tariff to the fullest scrutiny and indicated that AT&T would face a strict burden of proof if it sought to deaverage its rates. [232] We reaffirm this commitment here.

182. We note as well that, wholly apart from our regulatory requirements, it would appear to be in AT&T's own interest to maintain geographically averaged rates. Indeed, AT&T began geographic averaging of its toll rates before the Commission's inception, and AT&T's competitors also have geographically averaged rates even though they are not compelled to do so. All IXCs choose geographically averaged rates because they have strong economic incentives to do so. In particular, the costs of administering a geographically deaveraged rate structure, including the costs of calculating, billing, and marketing rates for all of the various nationwide route permutations, would be significant. Moreover, the Commission's access charge rules are designed, in part, to ensure that carrier common line charges imposed on IXCs do not create incentives for geographic rate deaveraging.

183. We tentatively conclude that our proposals would not undermine geographically averaged rates because those proposals would not appear to affect the reasons behind AT&T's commitment to geographically averaged rates. We seek comment on this tentative conclusion, and on whether any changes in our proposals are necessary in light of our commitment to geographically averaged rates.

D. *Alternative Proposal*

184. For various reasons discussed above, including our desire to proceed with regulatory reform in a cautious and prudent manner, our principal proposal, outlined above, is a phased-in package of regulatory reform for AT&T. This package would include immediate reform of only those services deemed most fully competitive, in particular, many of the services used primarily by business customers. Other services, including 800 service, international MTS, and MTS and ReachOut America services would remain subject to price caps regulation, pending further development of competition for those services or future assessment of additional reform.

185. We now set forth for comment an alternative proposal. Specifically, we seek comment on whether, instead of proceeding on a service-by-service basis, as outlined above, we can and should declare AT&T to be nondominant under our *Competitive Carrier* regulatory framework. [233] Under *Competitive Carrier* policies, we would then forbear from Title II regulation of AT&T, or, alternatively, we could apply maximum streamlining to all AT&T services.

186. We offer this alternative proposal, not only to obtain comment on as broad a range of options as possible, but also because of our tentative conclusion that AT&T already faces significant competition for all or virtually all of its interstate services. Under the circumstances, immediate regulatory reform of all of AT&T's services may be warranted. We therefore seek comment on whether, in lieu of our principal reform package, we can and should declare AT&T to be nondominant pursuant to *Competitive Carrier*, and, if so, whether AT&T should be subject to forbearance or maximum streamlined regulation.

V. CONCLUSION

187. The time has come for a reexamination of the way the Commission regulates the provision of interstate interexchange services. As discussed in this Notice, there have been vast changes in the interexchange market since the the Commission completed the last such proceeding in the early 1980s. For example, several of AT&T's competitors have constructed sophisticated nationwide fiber optic netwoks, AT&T's market share has fallen dramatically, and the way in which large business customers obtain service has changed. In addition, most subscribers now have the ability to designate the primary interexchange carrier of their choice.

188. We believe that the proposals outlined above offer significant benefits to consumers by eliminating unnecessary and potentially harmful regulation of fully competitive services while recognizing the need to proceed cautiously in the case of services that are subject to less intense competition. Thus, the present proposal for regulatory reform focuses primarily on services used by large business customers, the area of most intense competition, while proposing to defer changes in regulation for 800 Service, IMTS and operator services which are less fully competitive. We also propose continued price cap regulation for residential and small business services. These proposals should bring regulation in line with changing marketplace realities, benefitting all consumers.

VI. REGULATORY FLEXIBILITY ACT ANALYSIS

189. Given that the proposals contained in this Notice apply only to AT&T, we certify that the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (1987), is not applicable to the changes we are proposing in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this Notice in the Federal Register.

VII. EX PARTE REQUIREMENTS

190. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *exparte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

191. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an ex parte presentation.

192. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

193. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

VIII. ORDERING CLAUSES

194. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals. [234]

195. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 & 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before June 12, 1990, and reply comments SHALL BE FILED with the Secretary on or before July 12, 1990. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleadings with the Policy and Program Planning Division, Common Carrier Bureau, Room 544, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed in this docket with this Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] MCI v. FCC, 561 F.2d 365 (D.C. Cir.), *cert. denied*, 434 U.S. 1040 (1978) (*Execunet I*) ; MCI v. FCC, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978) (*Execunet II*).

[2] *See generally* Brock, *The Telecommunications Industry* (1981) at 180-197.

[3] Microwave relay was particularly well-suited for the transmission of television programming because video signals, being broad-band, could not be carried on ordinary wire. Although AT&T had developed coaxial cable that had sufficient capacity to convey a broadband video signal, the laying of new cable was costly and required procurement of rights-of-way, which could take considerable time and expense.

[4] Uncertain of frequency supply and demand, the Commission provided only very limited ability to entities other than AT&T to employ microwave services. Generally, the Commission limited microwave spectrum to common carrier use only. Al-

though the Commission did authorize construction and use of private microwave systems for video transmission to areas where common carrier service was unavailable, private users were required to abandon their microwave systems once common carrier service was made available to them. *See* Allocation of Frequencies to the Various Classes of Non-Government Services in the Radio Spectrum from 10 Kilocycles to 30,000,000 Kilocycles, 39 FCC 298 (1948). Moreover, having largely limited microwave spectrum to common carrier use, the Commission refused to require AT&T to interconnect with other carriers' microwave facilities. *See* American Telephone & Telegraph Co., 42 FCC 1 (1949); Establishment of physical connections and through routes and charges applicable thereto, 17 FCC 152 (1952).

[5] Allocation of Frequencies in the Bands Above 890 Mc, 27 FCC 359 (1959) (" *Above 890* ").

[6] Microwave Communications, Inc., 18 FCC 2d 953 (1969).

[7] *Id.* at 958-960.

[8] By July, 1970, 1700 microwave station applications were pending before the Commission. *See* Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules (*Specialized Common Carrier Services)* 29 FCC 2d 870, 871, note 1 (1971), *aff' d*, 31 FCC 2d 1106 (1971), *aff'd sub nom.*, Washington Utilities and Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[9] *Id.* at 940.

[10] A contributing factor was AT&T's resistance to providing its competitors full interconnection with the Bell System. Initially, AT&T claimed that the Commission lacked jurisdiction to order interconnection. In 1974, the Commission rejected this claim. Bell System Tariff Offerings, 29 R.R. 2d 1589 (1974). During the next two years, the Commission also rejected various AT&T tariff restrictions that limited the ability of AT&T's competitors to obtain full interconnection. *See* Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers, 46 FCC 2d 413 (1974), *aff'd sub nom.*, Bell Telephone Company of Pennsylvania v. FCC, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 423 U.S. 886 (1975); AT&T Restrictions on Interconnection of Private Line Services, 60 FCC 2d 939 (1976).

[11] *See* Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures, 61 FCC 2d 766, 800-805 (1976).

[12] Resale and Shared Use of Common Services, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd sub nom.*, AT&T v. FCC, 572 F.2d 17 (2nd Cir.), *cert. denied*, 439 U.S. 875 (1978).

[13] *See* Packet Communications, Inc., 43 FCC 2d 922 (1973). Value added networks lease channels from AT&T or other carriers and provide additional equipment and services of value, such as protocol processing, to their customers. Protocol processing enables data communications between otherwise incompatible terminals.

[14] Establishment of Domestic Communication-Satellite Facilities by Non-Governmental Entities, Second Report and Order 35 FCC 2d 844 (1972), *aff'd sub nom.*, Network Project v. FCC, 511 F.2d 786 (D.C. Cir. 1975).

[15] This restriction reflected the Commission's concern that specialized common carriers (offering private line services pursuant to the authority granted the year before in *Specialized Common Carriers)* would not be able to compete with AT&T if AT&T were immediately permitted to use satellite transmission for private line services. The Commission's policy was essentially intended to give other carriers the chance to establish themselves and develop a customer base before facing competition from AT&T. *Id.* at 846-848. The Commission stated that the AT&T restriction would be lifted no later than three years after AT&T commenced domestic satellite operations. *Id.* at 851-52.

[16] *See* Licensing of Space Stations in the Domestic Fixed-Satellite Service, 88 FCC 2d 318, 321 (1981).

[17] RCA Global Communications, Inc., 42 FCC 2d 774 (1973) (Telesat lease); 56 FCC 2d 660 (1975) (SATCOM construction permits); 56 FCC 2d 1066 (1975) (SATCOM I launch); 58 FCC 2d 656 (1976) (SATCOM II launch).

[18] *See* Western Union Telegraph Company, 38 FCC 2d 1197 (1973), 40 FCC 2d 1123 (1973), and 41 FCC 2d 379 (1973) (construction permits); 46 FCC 2d 162 (1974) (WESTAR I launch); 47 FCC 2d 274 (1974) (WESTAR II launch).

[19] American Telephone & Telegraph Co., 42 FCC 2d 654 (1973); GTE Satellite Corp., 43 FCC 2d 1141 (1973); COMSAT General Corp., 42 FCC 2d 677 (1973), 45 FCC 2d 444 (1974); 59 FCC 2d 344 (1976) (COMSTAR D-1 launch); FCC 76-705, released July 29, 1976 (COMSAT D-2 launch).

[20] *See* Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Services, 84 FCC 2d 584 (1981) (noting and listing authorizations which were granted that same day in separate orders). The twenty satellites authorized for launch had at least ten transponders each, with most having 24. At the then-current state of technology, each transponder could accommodate approximately 1200 simultaneous voice channels, 60 megabits of data per second, or a single color television channel with associated audio. *See* Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982).

[21] MCI Telecommunications Corp., 60 FCC 2d 25 (1976).

[22] *Execunet I*, *supra*, n. 1.

[23] *Execunet II*, *supra*, n. 1, *reversing* Petition of AT&T for a Declaratory Ruling and Expedited Relief, FCC 78-142, Memorandum Opinion and Order, released February 28, 1978.

[24] MTS and WATS Market Structure, 81 FCC 2d 177 (1980).

[25] *Id.* at 202. The Commission also rejected arguments that competition in the provision of MTS or WATS would: (1) result in the wasteful duplication of telecommunications facilities; (2) discourage AT&T from investing in new, efficient, high-volume facilities; (3) jeopardize the viability of independent telephone companies; or (4) result in telephone rate increases. *Id.* at 181-198.

[26] Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167 (1980).

[27] *See* AT&T Comments in CC Docket No. 83-1147, Long-Run Regulation of AT&T's Basic Domestic Interstate Services, at 37-38.

[28] *See* Telecommunications in Transition, The Status of Competition in the Telecommunications Industry, A Report by the Majority Staff of the Subcommittee on Telecommunications, Consumer Protection and Finance of the Committee on Energy and Commerce, U.S. House of Representatives (Nov. 3, 1981) at 59, Charts 23, 25-27 (*Telecommunications in Transition). See also Competitive Carrier Further Notice*, *supra*, 84 FCC 2d at 504.

[29] *Telecommunications in Transition*, *supra* at 59.

[30] AT&T Comments in CC Docket No. 83-1147, *supra*.

[31] *Id.* at 52, note **.

[32] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rule Making, CC Docket No. 79-252, 77 FCC 2d 308 (1979); First Report and Order (*First Report*), 85 FCC 2d 1 (1980); Further Notice of Proposed Rule Making (*Further Notice*), 84 FCC 2d 445 (1981); Second Report and Order (*Second Report*); 91 FCC 2d 59 (1982), *recon. denied*, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rule Making, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rule Making, 48 Fed. Reg. 28282 (1983); Third Report and Order (*Third Report*), 48 Fed. Reg. 46791 (1983); Fourth Report and Order (*Fourth Report*), 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rule Making, 49 Fed. Reg. 11856 (1984); Fifth Report and Order (*Fifth Report*), 98 FCC 2d 1191 (1984); Sixth Report and Order (*Sixth Report*), 99 FCC 2d 1020 (1985), *rev'd and remanded sub nom.*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[33] The *First Report* defined market power as the ability to control price in the marketplace. 85 FCC 2d at 10, para. 26.

[34] *See First Report*, 85 FCC 2d at 20, para. 55: "[A] firm without market power does not have the ability or incentive to price its service unreasonably, to discriminate among customers unjustly, to terminate or reduce service unreasonably or to overbuild its facilities." *See also id.* at para. 56: "[A] competitive firm, lacking market power, must take the market price as given, because if it raises price it will face an unacceptable loss of business, and if it lowers price it will face unrecoverable monetary losses in an attempt to supply the market demand at that price."

[35] *Id.* at 35-38, paras. 102-111.

[36] *Id.* at 21-23, paras. 58-64.

[37] *See* 84 FCC 2d 463-70, paras. 54-66. The Act defines "common carrier" essentially as an entity "engaged as a common carrier for hire." *See* 47 U.S.C. § 153(h).

[38] 84 FCC 2d at 478-491, paras. 87-119.

[39] *See Second Report, supra*. Other Title II requirements continued to apply to all carriers.

[40] *See Fourth Report*, 95 FCC 2d at 557.

[41] *Fifth Report*, 98 FCC 2d at 1209-1210. These remaining nondominant carriers included domestic satellite carriers, long-distance carriers affiliated with certain independent telephone companies, miscellaneous common carriers (which relayed video signals and their corresponding audio components by terrestrial microwave), and certain carriers providing DEMS (a form of high speed, two-way digital transmission service). Subsequently, in the *Sixth Report*, the Commission *required* nondominant carriers subject to forbearance to provide their service offerings on a non-tariffed basis. On appeal, the United States Court of Appeals held that this requirement exceeded the Commission's statutory authority and that the Commission could not prohibit carriers, including nondominant carriers, from filing tariffs. MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1984).

[42] Policy and Rules Concerning Rates for Dominant Carriers, Notice of Proposed Rule Making, 2 FCC Rcd 5208 (1987).

[43] Policy and Rules Concerning Rates for Dominant Carriers, Further Notice of Proposed Rule Making, 3 FCC Rcd 3195 (1988).

[44] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rule Making, 4 FCC Rcd 2873 (1989).

[45] United States v. AT&T, 552 F. Supp. 131 (D. D.C. 1982) (MFJ), *aff'd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983) (approving MFJ); United States v. AT&T, 569 F. Supp. 1057 (D. D.C.) (Plan of Reorganization), *aff'd sub nom.*, California v. United States, 464 U.S. 1013 (1983) (approving Plan of Reorganization).

[46] 552 F. Supp. at 172.

[47] *See, e.g.*, 552 F. Supp. at 171 (discrimination and cross-subsidization are "the two main barriers that previously deterred firms from entering or competing effectively in the interexchange market").

[48] *Id.* at 172. The Court stated: "The Court does not find that there is *no* possibility that AT&T will use its still considerable market share in an anticompetitive manner. It does find, however, that for the reasons cited, both the incentive and the opportunity for anticompetitive conduct will after divestiture and on account of divestiture be greatly reduced." *Id.* at note 175.

[49] *See* United States v. Western Electric, Co., Inc., Civil Action No. 82-0192 (D. D.C. July 28, 1989), wherein the Court relieved AT&T of the electronic publishing restrictions of the MFJ, stating: "The basic fact of life . . . is that, as discussed above, several large and effective interexchange carriers other than AT&T exist in all areas of the country, and the monopoly or quasi-monopoly situation that gave life and reason to the electronic publishing prohibition on AT&T no longer exists. For that reason, the audiotex providers can switch at any time from AT&T to a competitive carrier if they believe that AT&T discriminates in access to the network or otherwise . . . ." Slip op. at 7-8.

[50] *See* 552 F. Supp at 195-199. The equal access provisions of the MFJ also prohibited the BOCs from discriminating between AT&T and other companies in procurement activities, establishment and dissemination of technical standards and information, network planning, and use of, and charges for, BOC facilities. *See* MFJ, § II(B), *reprinted at* 552 F. Supp. at 227. *See also United States v. GTE Corp.*, 603 F. Supp. 730 (D. D.C. 1984).

[51] This was due in large part to the fact that LEC networks were designed under the assumption that AT&T would be the only IXC receiving access service.

[52] *See* Lande, "The Relationship of Equal Access Conversion to AT&T's Market Share," Dec. 1989.

[53] *MTS and WATS Market Structure Phase III*, 100 FCC 2d 860 (1985).

[54] *Id.* at 875. In the absence of such a request, independent telephone companies were required to convert end offices with stored program control switches as soon as practicable, given the capital constraints of the company and the market and other business conditions in the area served by the end office. *Id.* In subsequent orders the Commission ordered Southern New England Telephone Co. and the Puerto Rico Telephone Co. to accelerate their deployment of equal access. *See* Implementation of Equal Access by the Southern New England Telephone Co., 2 FCC Rcd 2312 (1987); Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Services Off the Island of Puerto Rico, 2 FCC Rcd 6600 (1987).

[55] *Id.*

[56] MTS and WATS Structure, 93 FCC 2d 241 (1983) (*Phase I Order*). From 1978 until 1984, the effective date of the *Phase I Order*, an interim agreement (the Exchange Network Facilities for Interstate Access or ENFIA agreement), negotiated between AT&T and its competitors and approved by the Commission, governed the payment of access charges by other IXCs. Under the ENFIA agreement, AT&T competitors paid access charge rates that were lower than the access compensation that AT&T paid through the divisions of revenues process.

[57] *See* MTS and WATS Market Structure, 97 FCC 2d 834, 858-63 (1984).

[58] *See, e.g.*, MTS and WATS Market Structure, 100 FCC 2d 860 (1985) (*Phase III Order*) ; Investigation of Access and Divestiture Related Tariffs, 97 FCC 2d 1082 (1984); 101 FCC 2d 911 (1985) (*Allocation Order*).

[59] *See* Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, FCC, February 14, 1990, Table 10, p. 14.

[60] On August 23, 1989, the Alternative Carrier Telecommunications Association filed a petition asking us to initiate a Notice of Inquiry and Rule Making to obtain facts and information on the state of competition in the long-distance marketplace. *See* Investigation of the State of Competition in the Long Distance Interexchange Marketplace, RM-7007. We hereby incorporate the record obtained in that proceeding and terminate that proceeding.

[61] Long Distance Market Shares: Fourth Quarter, 1989, Industry Analysis Division, Common Carrier Bureau, FCC, March 20, 1990 at Table 3.

[62] *Id.* at Table 2.

[63] *Id.* at Table 4.

[64] *See* Shepherd, "AT&T Dominance in the Long Distance Telecommunications Market," Oct. 1989, Table 1, attached to Comments of the National Telecommunications Network submitted in RM 7007.

[65] *See* Landes and Posner, *Market Power in Antitrust Cases*, 94 Harvard L.R. 937, 979 (1981) (arguing that market share is only one factor bearing on market power and that courts increasingly adjust the weight accorded to market share based on qualitative evidence regarding elasticity of demand and supply). *See also* Krattenmaker, Lande, and Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Georgetown L.J. 241, 259 (1987):

> Use of market share as a proxy for market power has rightfully been criticized for ignoring other important market information such as the ability of competing firms to expand or of new competitors to enter. At the extreme, the theory of contestability shows that even a firm with a 100% market share may have no ability to raise price or collect monopoly profits under certain, albeit highly restrictive circumstances. (citations omitted).

[66] *See id.*

[67] High supply capabilities of competitors in the market are thus indicative of high supply elasticities. Another factor that may indicate high supply elasticities is low entry barriers, which enable new competitors, not currently providing service, to enter the market.

[68] *See* Landes and Posner, *supra*; Krattenmaker, Lande, and Salop, *supra*.

[69] Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, FCC, February 14, 1990, Table 14.

[70] *Id.* Because these data relate to IXCs that purchase equal access from the BOCs, they exclude from consideration the three states not served, at least in part, by a BOC -- Connecticut, Hawaii, and Alaska. In fact, the data provided may understate the number of IXCs purchasing equal access in particular states, since some IXCs may purchase equal access from an independent telephone company, but not a BOC.

[71] At least 25 IXCs purchase equal access in the following states, as well as the District of Columbia: California; Illinois; Missouri; New Jersey; New York; Pennsylvania; Texas; and Wisconsin. Between 20 and 25 IXCs purchase equal access in another ten states. *Id.* Including resellers purchasing Feature Group A and Feature Group B access, over 500 carriers currently provide interstate telephone service in the United States. No state is served by less than thirteen IXCs, and in at least half of the states, more than thirty IXCs currently operate. In five states -- California, Illinois, New York, Pennsylvania, and Texas -- there are over 100 IXCs providing service. *Id.* at Tables 12, 13. In addition, IXCs face competition from value added networks.

[72] Summary of Long Distance Carriers, Industry Analysis Division, FCC, June 6, 1989, Tables 5 and 9.

[73] Indeed, a *DATAPRO* survey indicates that, even as early as 1986, customers perceived little difference in the quality of service provided by AT&T and other leading facilities-based IXCs. *See DATAPRO*, October, 1986, MT-20-500-112, 113. A 1987 survey conducted by *DATA Communications* corroborates these findings. *See* "Report Cards Out: Carriers Rated on Service, Quality," *Data Communications*, August 1987.

[74] *See, e.g., Network World*, May 15, 1989, p. 39-40.

[75] *See* Fiber Deployment Update, End of Year 1989, Jonathan Kraushaar, Industry Analysis Division, Common Carrier Bureau, FCC, Feb. 28, 1990, Table 1. Fiber optic miles represent the length of all fiber optic cable multiplied by the number of fibers per cable. The capacity of each fiber depends upon the terminal and repeater technology deployed. For example, 1.7 Gigabit terminal technology supports up to about 25,000 2-way circuits per fiber-pair. *Id.* at 2. Route mileage shows the geographic size of a fiber optic network. If an IXC expands its fiber optic network to new routes not previously served by fiber, its route mileage increases. In contrast, if it adds more fiber optic cable on routes already served by fiber, its fiber optic miles increase, but its route mileage remains the same.

[76] Indeed, a Common Carrier Bureau report released last year concluded that if the then-available 1.9 million fiber miles of interexchange fiber were fully equipped with terminal and repeater equipment operating at 1.76 Gigabits per second, the installed base of fiber would provide for as much as 20 billion circuit miles, which is probably on the order of ten times the potential capacity of AT&T's predivestiture long distance network. FCC News Release, "FCC Releases Fiber Deployment Analysis," February 17, 1989. The total number of IXC fiber miles has since increased to 2.2 million. *See* Fiber Deployment Update, End of Year 1989, *supra* note 75, at Table 1. Another report states that with 1.7 gigabit per second technology, total interLATA traffic volume will fill no more than 6-7% of available fiber capacity in 1990. *See* Porter, "Competition in the Long Distance Telecommunications Market: An Industry Structure Analysis," October 1987. This report was attached as Appendix A to AT&T's Comments filed in October 1987 in response to a Notice of Proposed Rule Making in the Price Caps proceeding, 2 FCC Rcd 5208 (1987).

[77] MCI 1989 Annual Report at 31. Whereas in 1986, MCI posted a net loss per share of $1.81, in 1989, it reported net earnings per share of $2.09. *Id.* The price of MCI stock has climbed from under $10 per share in 1986 to over $35 per share today, notwithstanding a recent decline from its previous high.

[78] *Id.*

[79] Other, smaller carriers have also increased their revenues and profits in recent years. Thus, between 1987 and 1988, switched minutes of use of carriers other than AT&T, MCI, and Sprint increased by triple the industry average. Nine IXCs (other than AT&T, MCI, and Sprint) reported 1988 gross revenues in excess of $100 million and these carriers collectively enjoyed an 82% increase in net income from 1987 to 1988. *See* Survey of the Long Distance Telephone Industry: 1987 and 1988 Financial

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and Operating Statistics, Revised Version, prepared by Ernst & Whinney for the Competitive Telecommunications Association, May 31, 1989 at 2, 16, and 18.

[80] MCI 1988 Annual Report at 5.

[81] For purposes of this Notice, these include services in the Business Services Basket under price cap regulation, but not 800 Service or other small business services, which are placed in other baskets. These business services also include certain AT&T services outside of price caps regulation. *See infra* at para. 116.

[82] *DATAPRO*, September 1985, MT30-120-101.

[83] While we lack recent data indicating the percentage of revenues generated by various numbers of customers, in 1977, 4% of all business customers generated 62% of interstate long-distance business revenues. *See* Telecommunications in Transition, *supra*, at 88-9, *citing*, Telecommunications Industry Task Force, "The Dilemma of Telecommunications Policy," 1977.

[84] *See* Porter, *supra* at 24, *citing* International Resource Development, Inc., *Private Telecommunications Networks - Equipment & Services Market* (1985) at 182. Moreover, the threat posed to IXCs by private networks is not limited exclusively to customers that have the capital and expertise to build and operate a complete network. Business customers can lease dedicated transmission facilities from a telephone company and provide their own switching.

[85] *See* NTIA Telecom 2000, p. 238 (noting that Wal-Mart recently put into operation a private satellite network connecting approximately 1200 locations).

[86] *Communications Week*, Dec. 26, 1988, p. 20 (reporting study conducted by Focus Research Systems, Inc, Hartford Conn.).

[87] "A Look at Alternative Long Distance Carriers," Research Note, Nov. 1989, TFS-COMM/SURV, Westford, Massachusetts.

[88] In particular, the study found that the average budget of customers identifying MCI as their primary carrier exceeded $3.1 billion, whereas the average budget for customers identifying AT&T was slightly less than $3 billion, and the average budget when Sprint was primary carrier approximated $1.9 billion. In addition, the study found that customers choosing MCI as their primary carrier delivered an average of 78.2% of their traffic to MCI, whereas customers identifying AT&T or Sprint, delivered 74.5% and 63.5%, respectively.

[89] "US Sprint and MCI Tied as Alternatives to AT&T," Market Information Center, Inc., Marlboro, Mass., January 8, 1988.

[90] As of July 1, 1989, the Price Cap Index for AT&T's Basket 3 services was 99.5, while the Actual Price Index for Basket 3 services was 94.3.

[91] Trade press accounts, of course, do not include all the terms and conditions of communications contracts, and may sometimes prove inaccurate on the details they report. They do, however, prove a useful indicator of the increasing vigor of competition for large customers.

[92] *Communications Week*, May 8, 1989.

[93] *Id.*, May 15, 1989, p. 1.

[94] *Id.*, April 24, 1989, p. 1.

[95] *NewsNet*, Nov. 16, 1989.

[96] *Id.*, Jan. 9, 1989, p. 1.

[97] *Id.*, Aug. 14, 1989, p. 6.

[98] *Network World*, Nov. 6, 1989, p. 3.

[99] *Id.*, May 1, 1989, p. 6.

[100] *Id.*, April 24, 1989, p. 7.

[101] *Communications Week*, Oct. 9, 1989, p. 11.

[102] *Network World*, May 15, 1989, p. 57.

[103] *Id.*

[104] *Communications Week*, May 5, 1989, p. 21.

[105] *Id.*, July 10, 1989, p. 1.

[106] *Id.*, March 20, 1989, p. 5.

[107] *Network World*, Feb. 13, 1989, p. 8.

[108] *Communications Week*, Sept. 25, 1989, p. 10.

[109] *Id.*, May 8, 1989, p. 6.

[110] *Id.*, Oct. 2, 1989, p. 7.

[111] *Id.*, Oct. 9, 1989, p. 1.

[112] *Network World*, Jan. 16, 1989, p. 11; *Communications Week*, Jan. 16, 1989, 12.

[113] *Communications Week*, June 26, 1989, p. 34.

[114] *McGraw - Hill News*, June 7, 1989.

[115] *Network World*, April 24, 1989, p. 7.

[116] *Communications Week*, May 29, 1989, p. 32.

[117] *Washington Post*, Feb. 21, 1990, p. C1.

[118] Specifically, 800 numbers are not portable because of the need for LECs providing access for 800 service to identify the IXC to which an 800 call should be routed. Currently, LECs perform this function by reading the three digits that follow the 800 prefix (the NXX digits). Various NXX digit combinations are assigned to each IXC. Consequently, subscribers that wish to change IXCs must change the NXX digits in their 800 number. Also, if they seek a particular 800 number, they must obtain their 800 service from the IXC to which the NXX digits in that number have been assigned.

[119] This new access system depends on the establishment of regionalized LEC databases that would associate the 800 customer's choice of IXC with its 800 number. Thus far, the Commission has permitted LECs to offer this new form of 800 access only if they also offer IXCs the option of taking NXX access instead. *See* Provision of Access for 800 Service, 4 FCC Rcd 2824, 2829 (1989). The Commission has stated, however, that it will permit LECs to replace NXX access with the new form of access that permits number portability if and when their deployment of the CCS7 signaling system enables them to reduce substantially the delays associated with the new form.

[120] To offset partially this advantage, Bellcore, the administrator of the 800 numbering plan, has "frozen" some of AT&T's NXXs -- *i.e.*, it has prohibited AT&T from offering to prospective new customers some of the NXXs currently used by AT&T's embedded 800 customers. AT&T still maintains an advantage, however, with more than double the number of assignable NXXs than MCI and more than triple the number of US Sprint.

[121] We note that AT&T has priced its 800 services well below the price cap ceiling set for basket 2 services. On the other hand, AT&T maintained a monopoly on 800 service until late 1986, and these price decreases may reflect, in part, the loss of this monopoly power, rather than a fully competitive 800 market.

[122] *See Price Caps Order*, *supra*, 4 FCC Rcd at 3057, para. 371, *citing* Regulatory Policies and International Telecommunications, CC Docket No. 86-494, Report and Order and Supplemental Notice of Inquiry, released March 25, 1988, 53 Fed. Reg. 12,546 (April 15, 1988) at para. 80.

[123] The only country in the top twenty (in terms of originating and terminating traffic revenues) in which AT&T faces no facilities-based competition is Jamaica (ranked 19th). Traffic to and from Jamaica accounted for less than 2% of IMTS revenues in 1988. *See* International Communications Traffic Data Report for 1988, Industry Analysis Division, Common Carrier Bureau,

FCC, Oct. 11, 1989 *See also* Trends in the International Communications Industry, 1975-1988, Industry Analysis Division, Common Carrier Bureau, Dec. 1989.

[124] Trends in the International Communications Industry, 1975-1988, Industry Analysis Division, Common Carrier Bureau, FCC, Dec. 1989, at 18. These figures represent average 1988 market share -- the latest FCC figures available. Because MCI and Sprint obtained operating agreements for a number of key countries during the past three years, it may well be that AT&T's market share has declined to some degree since then.

[125] Operator services used to require intervention of a human operator. Now functions formerly performed by human operators are sometimes performed by computers. We use the term "dial 0" service to refer to "0" calls, regardless of whether they involve the intervention of an operator. Thus, dial "0" interLATA calls include 00- calls (when the caller dials "00" in order to reach an IXC operator), 0+ calls (when the caller dials "0" followed by the called number), as well as 00- or 0+ calls that are preceded by 10XXX, or a 950 or 1-800 number. For purposes of this section, operator services do not include directory assistance service for 800 calls.

[126] Petition of the Ameritech Companies for Rule Making on Dial "0" Exchange Access Traffic, RM-6113, August 7, 1987, at 3.

[127] *See* AT&T Comments, dated Oct. 2, 1987, in RM-6113, Affidavit of James W. Selzer at 10-11.

[128] We seek specific information regarding the reasonableness of this assumption.

[129] *See* United States v. Western Electric Co., 698 F. Supp. 348 (D. D.C. 1988) (ordering BOCs to implement equal access on their payphones); United States v. GTE Corp., Memorandum, Civil Action No. 83-1298 (D. D.C. Dec. 23, 1988) (ordering GTE to implement equal access on its payphones).

[130] These sharing arrangments are due to expire in 1991, when the BOCs complete their own data base system -- known as the Line Identification Data Bases, or LIDB.

[131] In 1987, US Sprint represented that it was forced to refuse 250,000 calls per month because the caller sought to use a BOC calling card. US Sprint stated that this cost US Sprint approximately $12 million per year. *See* Letter, dated July 27, 1987, from John Hoffman, Senior Vice President, External Affairs, US Sprint, to Nancy Garrison, Assistant Chief, Communications and Finance Section, Antitrust Division, U.S. Dept. of Justice, attached to US Sprint Comments, dated Oct. 2, 1987, in RM-6113.

[132] This Commission recently rejected as unlawful Cincinnati Bell's tariff seeking to implement presubscription for its payphones. Cincinnati Bell Tel. Co., CC Docket No. 89-323, 5 FCC Rcd 805 (1990).

[133] We also seek comment on the effect of near-term changes in the provision of operator services on our analysis of the level of competition in the provision of interstate operator services. For instance, AT&T apparently plans to reissue its calling cards with new calling card numbers. Because AT&T generally employs the same calling number as the BOCs, the OCCs are currently able to validate AT&T calling cards. AT&T cannot, however, validate OCC calling cards. We seek comment on whether AT&T's reissuance of its own cards would confer an advantage on AT&T in the payphone marketplace, or whether the continued ability of OCCs to validate the BOC card is sufficient to preserve their ability to compete effectively in the payphone marketplace.

[134] Some BOCs have proposed implementation of a "billed party preference" system, which would route all calling card calls dialed from payphones on a 0+ basis to the IXC that issued the calling card. Although such a system, when technically and economically feasible, might be in the public interest, a billed party preference system would not be technically feasible until 1993, at the earliest. We tentatively conclude that such a system is not a prerequisite to any further relaxation of our regulation of AT&T's operator services.

[135] Five multiLATA states retain traditional rate-of-return earnings and pricing regulation for intrastate long-distance services, with tariffs required in all situations -- Arkansas, Massachusetts, New Mexico, Utah, and Wyoming.

[136] Iowa has retained oversight jurisdiction for a two-year period following deregulation of the interLATA market to provide a forum for Iowa consumers to present any concerns or complaints resulting from deregulation.

[137] These classifications were effected pursuant to the Illinois Universal Telephone Service Protection Law of 1985, which directed the Illinois Commerce Commission to classify all telecommunications services as competitive or noncompetitive.

[138] Rate increases require thirty days' notice.

[139] For example, South Dakota has enacted a regulatory scheme that classifies services into one of three categories: fully competitive, emerging competitive, and noncompetitive. AT&T's private line services are classified as fully competitive and are not subject to any price or earnings regulation. The remainder of AT&T's services are deemed emerging competitive services and are subject to tariffing requirements, albeit with reduced cost support and reduced (20 day) advance notice required. In determining whether AT&T's tariffs are lawful, the State Commission is instructed to consider the price of alternative services; the overall market for the service; the affordability of the price for the service in the market in which it is offered; the impact of the price of the service on the commitment to preserve affordable universal service; and the cost of providing the service.

Minnesota adopted a similar regulatory scheme, but classifies all of AT&T's services as "emergingly competitive." Minnesota permits AT&T to file rate decreases on 10 days' notice and increases on 30 days' notice. Tariffs must include incremental or other cost studies, however, only as determined by the State Commission. Oklahoma permits rate changes on 30 days' notice, with the State Commission reserving the right to request any supporting information it deems necessary.

[140] Missouri classifies other IXCs as "competitive" companies, and subjects them to less regulation than AT&T.

[141] For AT&T's MTS, the following regulatory constraints apply: (1) downward pricing flexibility allowed within a "range" of rates; (2) individual bands for each mileage band with pricing flexibility permitted within the band; (3) for rates currently below the cost of access, reductions permitted when necessary to implement minor changes in rate schedules; (4) reductions in access or federal taxes applicable to MTS must be flowed through dollar-for-dollar to the actual service price as a whole; (5) increases in access or federal taxes may be flowed through at AT&T's option; (6) for four years AT&T will be required to reduce its rates by 1.5% annually for the MTS category (annual reductions subject to renegotiation or renewal after the four-year period if MTS is again classified at that time as transitionally competitive); and (7) MTS ceilings and floors must be adjusted to reflect the 1.5% annual rate reductions as well as flow-throughs of access and federal tax changes.

[142] In addition, Montana has completely deregulated private line services.

[143] In addition, Michigan, Wisconsin, Florida, and Kentucky permit downward price flexibility for some services, including MTS.

[144] Although AT&T is not precluded from filing for above-band and above-cap rate increases, these increases must be filed on ninety days' notice, with the likelihood of suspension. Moreover, we have stated that we would not approve above-band rates unless justified by "substantial cause." *See AT & T Price Caps Order, supra*, 4 FCC Rcd at 3100-3111. AT&T faces a formidable burden in gaining approval of any above-band or above-cap rate; clearly this burden would be all but insurmountable if Basket 1 rate increases were accompanied by rate decreases for other services.

[145] Average variable cost is often used as a surrogate for marginal cost. *See Price Cap Order*, 4 FCC Rcd at 3115, para. 500 (1989). Marginal cost is "the incremental cost of making and selling the last unit" of production. *International Air Industries v. American Excelsior Co.*, 517 F.2d 714, 724 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). "Average variable costs are the costs that vary with changes in output divided by the output." *Id.* at note 27. *See also* ABA Antitrust Section, Antitrust Law Developments (2d ed. 1984) at 125-130 and Second Supplement 1983-1988 at II-11-II-15.

[146] *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

[147] Although some economic literature of the last decade has proposed other interpretations of predatory pricing, the Supreme Court's 1986 decision in *Matsushita* analyzed claims of predatory pricing in much the same terms we have used here. 475 U.S. at 588-595.

[148] There is a large body of economic literature on the various factors that facilitate or inhibit tacit price collusion. *See, e.g.*, George A. Hay, Oligopoly, Shared Monopoly, and Antitrust Law, 67 Cornell Law Rev. 439, 443-57 (1982); F.M. Scherer & D. Ross, Industrial Market Structure and Economic Performance (3d ed. 1990) at 235-316. Those factors most relevant to the interstate telecommunications marketplace include: (1) the number and size of sellers (a small number of equally sized sellers generally makes collusion easier, while a large number of sellers or size disparity among sellers makes it more difficult); (2) product heterogeneity (differentiated products or rapid technological change tend to make collusion more difficult); (3) the ratio of fixed to total costs (when the ratio is high, the incentive to shade price is stronger); (4) the size and frequency of orders (sporadically placed, high volume orders create incentives to cheat and make collusion less likely); (5) the relative openness or secrecy of sales (members of a group are more likely to reduce prices if those price concessions can be kept secret for a significant period of time); and (6) the "social structure" of the industry (*i.e* whether there are bonds of friendship and mutual respect that facilitate cooperation).

[149] As part of various bidding procedures, large business customers may inform carriers of various details of competitors' offers in attempts to elicit a more favorable bid. Unlike comprehensive tariff filings, however, this process does not appear likely to provide members of the group with complete and accurate pricing information, which significantly facilitates tacit collusion.

[150] Another factor that would tend to minimize the likelihood of tacit collusion in the interstate marketplace is the historical (and current) pattern of regulatory and legal conflict between AT&T and its competitors. Given this "social structure" in the industry, it would be more difficult for IXCs to find the mutuality of interest and cooperation necessary for sustained collusion.

[151] These services include AT&T's ProWATS (formerly ProAmerica I, II, and III), WATS, Megacom, SDN, other switched services, voice grade and below private line service, and other private line service. 47 C.F.R. § 61.42. *See also Price Cap Order, supra*, 4 FCC Rcd at 3064.

[152] 47 U.S.C. §204 (authority to suspend); Municipal Light Boards v. FPC, 450 F. 2d 1341 (D.C. Cir. 1971) (rejection).

[153] Competitive forces should also guard against discrimination since the disadvantaged group of customers could be lost to a competitive service provider.

[154] *See supra* at paras. 103-106.

[155] Under the current rules, below-cap, within-band rate filings may be made on 14 days' public notice. 47 C.F.R. § 61.58(c)(2). The annual price cap tariff revisions, below-band rate filings, new service filings, restructured services and non-rate tariff filings are to be filed on 45 days' notice. 47 C.F.R. §§ 61.58(c)(1), 61.58(c)(4), and 61.58(c)(5). Above-cap and above-band rate filings are to be made on 90 days' public notice. 47 C.F.R. § 61.58(c)(3).

[156] Part 61 of the Commission's rules defines a "new service offering" as a "tariff filing that provides for a new class or sub-class of service not previously offered by the carrier involved that enlarges the range of service options available to ratepayers." 47 C.F.R. § 61.3 (r). The rules define a "restructured service" as an "offering which represents the modification of a method of charging or provisioning a service; or the introduction of a new method of charging or provisioning that does not result in a net increase in options available to customers." New service offerings are not subject to the price cap ceiling initially, but must satisfy a cost-based net revenue test. Such filings are subsequently incorporated into the appropriate service basket and subject to the price cap ceiling and rate band requirements. *Price Caps Order*, 4 FCC Rcd at 3122-3129. Restructured services are subject to the price cap ceiling and the rate band requirements. *Id.* at 3129.

[157] 47 U.S.C. § 203 (b)(2).

[158] The U.S. Court of Appeals for the Eleventh Circuit has sanctioned use of a one day notice period for certain rate decreases under Interstate Commerce Act language similar to that in Section 203 of the Communications Act. Southern Motor Carriers Rate Conference v. United States, 773 F.2d 1561 (11th Cir. 1985).

[159] For example, particular service categories in the Business Services Basket could be incorporated into our basket for Residential and Small Business Services and thereby remain subject to price cap regulation.

[160] The 800 database access system would permit, among other things, 800 customers to divide their 800 traffic among different IXCs while using the same 800 number.

[161] As noted above, broader implementation of SS7 will reduce, or in some cases eliminate, any increase in post-dial delays under the access methodology that permits number portability. Several petitioners have sought reconsideration of various aspects of the Commission's decision last year on 800 service access. *See* para. 70, *supra*.

[162] AT&T's Tariff 15 filing for Resort Condominium International has been suspended and placed under investigation. *See* AT&T Communications, Transmittal No. 1854, CC Docket No. 90-11, FCC DA 90-44 (released January 19, 1990) (Resort Condominium Int'l), erratum, 5 FCC Rcd 690 (1990). AT&T's first Tariff 15 offering, the Holiday Rate Plan, was allowed to go into effect subject to investigation, but was later found unlawful for reasons specific to that offering. *See* AT&T Communications, Transmittal No. 1215, CC Docket No. 88-471, 4 FCC Rcd 7712 (1989), *recon. denied*, FCC DA 90-94 (released March 23, 1990).

[163] AT&T is currently permitted, pursuant to section 201(b) of the Act, to make tariff offerings available to government users without making them generally available to other non-government customers. 47 U.S.C. § 201(b). *See also* AT&T Communications, Inc., Transmittal No. 1876, DA 90-119, released Jan. 30, 1990. These tariff offerings are currently included in AT&T's Tariff 16 filings. Our contract proposal would permit AT&T to file government contracts within thirty days after their effective date, rather than in accordance with Tariff 16 filing requirements.

[164] Section 202(a) of the Act provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[165] In American Broadcasting Companies v. FCC, 643 F.2d 818 (D.C. Cir. 1980), the Court held that a private carrier/customer contract did not preclude the carrier from unilaterally altering its contract rates pursuant to a tariff revision. The Court based its decision on the ground that the Commission had not recognized private contracts by requiring that they be filed. The Court did not, however, address whether the contract at issue would have been lawful if it had been filed pursuant to Commission authorization. Noting that section 211(b) of the Act "arguably may authorize the Commission to provide for the filing of [carrier-customer] contracts," the Court based its holding on the fact that the Commission "has not yet exercised such authority, if any, as it may have in this respect." *Id.* at 823.

[166] Prior to 1980, the Interstate Commerce Act provided:

> If any common carrier charges . . . any person or persons a greater or less compensation for any service rendered . . . than it charges . . . from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier will be deemed guilty of unjust discrimination . . . . 49 U.S.C. §2 (repealed). In 1980, Congress enacted the Staggers Rail Act of 1980, 49 U.S.C. §§10101 *et. seq.*, substantially modifying railroad regulation; however the nondiscrimination provisions remained substantially the same. Similarly, Section 4(b) of the Natural Gas Act precludes any "undue prejudice or disadvantage" or any "unreasonable difference" in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. 15 U.S.C. §717(c) (1982).

[167] Change of Policy, Railroad Carrier Rates, Ex Parte No. 358-F (ICC Nov. 9, 1978).

[168] The ICC denied that contract rates had ever been *per se* unreasonable but noted considerable confusion on that point. *Id.*

[169] *See* Change of Policy, Railroad Contract Rates, Ex Parte No. 358-F, 361 ICC 205 (1979) (denying petition for Rule Making seeking detailed rules implementing contract rate policy).

[170] Change of Policy, Railroad Carrier Rates, Ex parte No. 358-F (ICC Feb. 21. 1980).

[171] Sea-Land Service, Inc. v. ICC, 738 F.2d 1311, 1316 (D.C. Cir. 1984) (emphasis added). Although Congress adopted the Staggers Rail Act prior to the *Sea - Land* decision, *Sea - Land* was decided pursuant to the prior version of the Interstate Commerce Act, not as amended by the Staggers Act. A number of other courts also have upheld the ICC's determination that the Interstate Commerce Act permitted contract rates prior to enactment of the Staggers Act. *See , e. g.*, Kansas Power & Light Co. v. Burlington Northern, Inc., 740 F.2d 780, 784 (10th Cir. 1984); Burlington Northern Railroad Co. v. ICC, 679 F.2d 934, 939 (D.C. Cir. 1982); Iowa Power & Light v. Burlington Northern, Inc., 647 F.2d 796, 807 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Southwestern Electric Power Co. v. Burlington Northern, Inc., 475 F. Supp. 510, 523 (E.D. Tex. 1979). Dicta in one case, however, suggests that it is unclear whether the ICC had pre-Staggers Act authority to accord presumptive validity to contract rates. *See* Cleveland-Cliffs Iron Co. v. ICC, 664 F.2d 568, 577 (6th Cir. 1981).

[172] Order No. 436, 523 Fed. Reg. 30,334 (1987), *reversed on other grounds*, Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987).

[173] 50 Fed. Reg. at 42,451.

[174] *See* Associated Gas Distributors v. FERC, 824 F. 2d 981, 1007-1013 (D.C. Cir. 1987).

[175] *Id.* at 1009.

[176] *Id.* at 1008-1011.

[177] This is to be contrasted with the NGA, under which Congress expressly contemplated "a vital role for private contracting." *Id.* at 1009.

[178] 47 U.S.C. §211(b) (emphasis added).

[179] 47 U.S.C. § 219(a) (emphasis added).

[180] Indeed, the Communications Act was expressly modeled after the ICA. *See, e.g.*, S. Rep. No. 781, 73rd Cong., 2nd Sess., pp. 2-3 (1934); *American Broadcasting Companies, Inc. v. FCC, supra*, at 820-821. We tentatively find that the fact that natural gas pipelines do not have a common carrier obligation to provide service upon reasonable request does not affect our review of the analogous nondiscrimination obligations of telecommunications common carriers and natural gas pipelines.

[181] We believe this bifurcated approach to disclosure complies with the Act. *Cf.* Water Transport Ass'n v. ICC, 722 F.2d 1025, 1030-32 (2nd Cir. 1983).

[182] One approach on these issues is that of the ICC. *See* Water Transport Assn. v. ICC, *supra*.

[183] If we adopted this proposal, governments would have the option of taking service from AT&T either under Tariff 16, which we would subject to maximum streamlining, or pursuant to private carriage.

[184] Pursuant to our *Competitive Carrier* policies, OCCs would not be required to file section 214 applications withdrawing facilities from common carriage.

[185] The marketplace is not currently characterized by such anticompetitive pricing. To the contrary, as evidenced by the price reductions that we have recently seen, we believe that pricing is intensely competitive. At the same time, a virtue of private carriage vis-a-vis contract carriage, at least to the extent contract carriage requires publicly-available filings, is that it would minimize the risk that such conduct might occur in the future.

[186] Private carriage rates that are too high, of course, are not a concern because common carrier services, subject to Title II, would remain available to all customers. No customer would be forced to accept private carriage in lieu of common carriage.

[187] Of course, the removal of Title II constraints would not alter the availability of antitrust remedies, including treble damages, for predatory pricing or other anticompetitive conduct.

[188] We also seek comment on how we may ensure that facilities withdrawals are consistent with Democratic Central Committee v. Washington Metropolitan Transit Commission, 485 F.2d 786 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974) and AT&T Information Systems, Inc. v. FCC, 854 F.2d 1442 (D.C. Cir. 1988).

[189] General Mobile Radio Service, 13 FCC 2d 1190 (1949).

[190] *Above 890*, *supra*.

[191] Land Mobile Service, 51 FCC 2d 945 (1975), *aff'd sub nom.*, National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630 (D.C. Cir. 1976) (*NARUC I*), *cert. denied*, 425 U.S. 992 (1976).

[192] *See, e.g.*, FCC v. Midwest Video Corp., 440 U.S. 689, 701 (1979); Second Computer Inquiry, 77 FCC 2d 384, 428-33 (1980), *recon.*, 84 FCC 2d 50 (1981), *aff'd sub. nom.*, Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[193] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982).

[194] Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C. Cir. 1984).

[195] *See* Philadelphia Television Broadcasting Co. v. FCC, 359 F. 2d 282 (D.C. Cir. 1966), wherein in affirming the Commission's decision to regulate community antenna television (CATV) systems as adjuncts of the nation's broadcasting system, rather than as common carriers, the Court stated: "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." *Id.* at 284. *See also* Computer and Communications Industry Assoc. v. FCC, *supra*, at 212 (quoting same); Wold Communications, Inc. v. FCC, *supra*, at 1475 (the public interest touchstone of the Act, beyond question, permits the FCC to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances, *citing*, FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981)). A similar approach has been used in other services. For example, in Revisions to Part 21 of the Commission's Rules Regarding the Multipoint Distribution Service, 2 FCC Rcd 4251 (1987), the Commission permitted entities initially proposing to provide service as common carriers to elect non-common carrier status.

[196] *NARUC I*, *supra*, at 641-42. Stated differently, an entity is not a common carrier "where its practice is to make individualized decisions, in particular cases, where and on what terms to deal." *Id.*

[197] 90 FCC 2d at 1256.

[198] Wold Communications, Inc. v. FCC, *supra*, 735 F.2d at 1471, n. 10.

[199] *Id.* at 1474-76.

[200] We are proposing to apply streamlined, as opposed to maximum streamlined, regulation to AT&T's provision of IMTS, because since 1985, streamlined regulation has applied to the provision of IMTS by nondominant carriers, as well as to AT&T's provision of non-IMTS international services. *See* International Competitive Carrier Policies, 102 FCC 2d 812 (1985).

[201] "Whipsawing" refers generally to the manipulation by foreign PTT monopolies of competing U.S. carriers against one another. Traditionally, whipsawing has involved efforts to change the levels of international accounting rates, which compensate carriers for the termination of international traffic. If a foreign PTT terminates more traffic from the U.S. than it originates to the U.S., whipsawing could involve, for instance, pressure by the foreign PTT on a U.S. carrier to accept an increased accounting rate by threatening to route a greater portion of return traffic over other U.S. carriers. The increased accounting rate would raise the revenues of the foreign PTT at the expense of U.S. carriers and ratepayers. *See* Implementation and Scope of Uniform Settlements Policy for Parallel Communications Routes, CC Docket No. 85-204, 51 Fed. Reg. 4736 (1986), *modified on recon.*, 2 FCC Rcd 1118 (1987); Uniform Settlement Rates, 84 FCC 2d 121 (1980).

[202] In Provision of Access for 800 Service, *supra*, the Commission authorized AT&T's continued provision of 800 DA service on a monopoly basis, at least until the industry had agreed on satisfactory alternative arrangements for the provision of this service. Consequently, we do not propose to streamline our regulation of AT&T's 800 DA service.

[203] Although we seek comment on whether to liberalize our tariffing requirements for AT&T's provision of operator services, we emphasize that all operator service providers, including AT&T, will remain subject to other requirements that have been imposed or that may be imposed in the future to ensure that consumers of operator services are able to obtain access to their preferred IXC for "0" calls. *See, e.g.*, Telecommunications Research and Action Center and Consumer Action v. Central Corp. et. al, 4 FCC Rcd 2157 (1989).

[204] Trends in Telephone Service, Industry Analysis Division, Common Carier Bureau, FCC, February 14, 1990, Table 10, p. 14.

[205] *Id.*

[206] *See Price Cap Order*, 4 FCC Rcd at 3138-3143.

[207] The fact that business services are currently priced below the cap while residential and small business services, which include MTS and ReachOut America, are priced at the cap is an indication that business services are subject to a greater degree of competition.

[208] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone & Telegraph Co., 102 FCC2d 655 (1985), *modified in part on recon.*, FCC 86-341, Mimeo No. 36818 (released August 7, 1986).

[209] Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 FCC 2d 958 (1986) (*Phase I Order*), *modified on reconsideration*, 2 FCC Rcd 3035 (1987), *aff'd on further reconsideration*, 3 FCC Rcd 1135 (1988). *See also* Report and Order, 2 FCC Rcd 3072 (*Phase II Order*), *modified on reconsideration*, 3 FCC Rcd 1150 (1988) (*Phase II Recon Order*).

[210] We do not propose to alter rules governing AT&T's allocation of costs between regulated and unregulated services, or the rules governing AT&T's use of customer proprietary network information.

[211] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., 102 FCC2d 655 (1985), *modified in part on recon.*, 104 FCC2d 739 (1986) (*AT & T Structural Relief Reconsideration Order*). *See also* Order, CC Docket No. 85-26, Mimeo No. CC 5503 (released July 3, 1986) (*AT & T Plans Order*), *aff'd*, 2 FCC Rcd 1214 (1987).

[212] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 FCC 2d 384, *modified on recon.*, 84 FCC2d 50 (1980), *further modified*, 88 FCC 2d 512 (1981), aff'd sub nom., Computer and

Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied,* 461 U.S. 938 (1983), *aff'd on second further recon.*,FCC 84-190 (released May 4, 1984).

[213] Furnishing of Customer Premises Equipment and Enhanced Services by American Telephone and Telegraph Co., CC Docket No. 85-26, Mimeo No. 5503 (released July 3, 1986), aff'd, 2 FCC Rcd 1214 (1987).

[214] *AT&T Structural Relief Reconsideration Order,* at para.42.

[215] *Phase I Order,* 104 FCC2d at 1036, para. 147.

[216] *See, e.g., AT&T Structural Relief Order,* 102 FCC 2d at 689-90, paras. 57-58; *Phase I Reconsideration,* 2 FCC Rcd at 3040-3042, paras. 33-36, 45-49.

[217] *Phase I Reconsideration,* 2 FCC Rcd at 3042, para. 46.

[218] *Id.*

[219] AT&T would, of course, remain subject to the nondiscrimination provisions of the Act with respect to its provision of basic services to all customers, including independent CPE vendors, independent ESPs, and their customers.

[220] Petition for Rule Making, Repeal of Requirement to Audit the Installation and Maintenance Nondiscrimination Plan of American Telephone and Telegraph Company, RM 6957, filed Aug. 15, 1989, at 5. We hereby incorporate into this proceeding the record of that proceeding and terminate that proceeding.

[221] 47 C.F.R. §68.110(b).

[222] Modifying our network disclosure requirements only for services subject to maximum streamlining would limit regulatory reform to the most competitively provided services. Such an approach, however, might raise administrative difficulties since it would require categorization of potential new services long before such services would be tariffed.

[223] *See* n. 208, *supra.*

[224] *Id.* at 442-43, para. 149.

[225] Such a practice would raise questions of possible violation of the Sherman Act prohibition against tying arrangements that unreasonably restrain trade. Generally, an invalid tying arrangement requires two separate products or services, an agreement to condition the sale of one commodity where the seller has "market power" (the tying product) on the sale of another commodity (the tied product), and a foreclosure of a not insubstantial amount of interstate commerce in the tied product. *See Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2 (1984)(Hyde).

[226] *Computer II,* 77 FCC 2d at at 444-45, para. 154.

[227] *Hyde* at 12.

[228] In *Computer II,* for example, the Commission noted that "if the markets for the components of the commodity bundle are workably competitive, bundling may present no major societal problems." *Computer II,* 77 FCC 2d at 443, n. 52.

[229] *Price Caps Order,* 4 FCC Rcd 2873, 3132.

[230] 4 FCC Rcd at 3132.

[231] *Id.*

[232] 4 FCC Rcd at 3133, para. 539.

[233] *See MCI v. FCC, supra,* n. 33, 765 F.2d 1186 (D.C. Cir. 1985).

[234] This action is taken pursuant to Sections 1, 4(i), 4 (j), 201-209, 211, 218, and 403 of the Communications Act as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-209, 211, 218, and 403, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553.

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